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No. ——

IN THE

Supreme Court of the United States

JAMES and JOYCE FERRELL, *et al.*,
Petitioners,

v.

ANDREW CUOMO, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners settled this lawsuit in 1976 by entry of a consent decree requiring respondent United States Department of Housing and Urban Development ("HUD") to operate a nationwide mortgage assignment program, specifically, a program to help families with FHA-insured mortgages avoid losing their homes in the face of temporary financial distress. Petitioners subsequently alleged that HUD was failing to honor its obligations under the decree. In 1979, petitioners and HUD negotiated, and the district court entered, an amended decree requiring HUD to operate a mortgage assignment program for five years and, thereafter, to provide foreclosure avoidance relief in the form of the mortgage assignment program or an "equivalent substitute."

Soon after entry of the amended decree, HUD lobbied Congress to eliminate the assignment program prior to the five-year period stipulated in the amended decree, and to replace it with an alternative program. The district court stated that such lobbying was prohibited by the amended decree. HUD then promised the district court that it would leave the assignment program intact for five years and would advocate changes in the proposed alternative program that would render it equivalent to the mortgage assignment program. HUD further promised that if Congress enacted an alternative program, HUD would not implement it without prior court approval. Finally, HUD acknowledged that, under the amended decree, it could only propose statutory replacements that were substantially equivalent to the mortgage assignment program.

Nonetheless, in 1995, HUD lobbied Congress to eliminate the mortgage assignment program and to allow HUD to operate a non-equivalent, voluntary alternative program—the "loss mitigation" program. Congress enacted

HUD's proposed legislation in 1996 but amended the legislation in 1998 to require HUD to operate a mandatory loss mitigation program to help families with FHA-insured mortgages retain their homes. On the effective date of the 1996 statute (April 26, 1996), HUD unilaterally terminated the mortgage assignment program and began operating a non-equivalent, non-mandatory loss mitigation program. Since that date, approximately 45,000 plaintiff class member-families have lost their homes—families who would have retained their homes and avoided foreclosure under the assignment program or an equivalent substitute.

The questions presented for decision herein are:

1. Whether HUD must continue to comply with the obligations imposed upon it by the amended consent decree, until the district court vacates or modifies the decree, when there has been a change in the law that HUD perceives as relieving it of its decree obligations.

2. Whether the Seventh Circuit, in reversing the district court's preliminary injunctive order requiring HUD to temporarily reinstate a mortgage assignment program or an equivalent substitute, erred in ruling on the ultimate merits of petitioners' case before the district court had the chance to rule on those merits in the first instance.

3. Whether, subsequent to passage of the Balanced Budget Downpayment Act, Pub. L. No. 104-99, 110 Stat. 26 (January 26, 1996), and the Appropriations Act for the Departments of Veterans Affairs and Housing and Urban Development, Pub. L. No. 105-276, 112 Stat. 2461 (October 21, 1998), HUD is still required by the amended decree to operate an equivalent substitute mortgage foreclosure-avoidance program based on the "loss mitigation" mandates set forth in the 1996 and 1998 statutes.

PARTIES TO THE PROCEEDING

Petitioners are James and Joyce Ferrell, Louis and Leeana Brooks, Calvin and Miriam Moore, William McCluster, Richard and Rosa Carter, Leonard and Virginia Scales, Harold and Judith Taylor, and LeMart and Dorothy White, all acting in their individual capacities and as representatives of a class certified by the district court and defined as: all persons who purchased homes pursuant to three federally insured programs of homeownership for low- and moderate-income families established by the National Housing Act, namely, Section 203, 12 U.S.C. § 1709, Section 221(d)(2), 12 U.S.C. § 1715 (d)(2), and Section 235, 12 U.S.C. § 1715, and who were or would be in default on mortgages insured under those programs. Respondents are the United States Department of Housing and Urban Development, and Andrew Cuomo, in his official capacity as Secretary thereof.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals of the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit of which petitioners seek review by this Court (App., *infra* at 1a-18a) is reported at 186 F.3d 805 (7th Cir. Ill. 1999). The order denying without comment petitioners' motion for a rehearing en banc (App., *infra* at 34a-35a), is unreported. The opinion of the district court (App., *infra* at 19a-33a) is unreported but is available on-line at 1998 U.S. Dist. LEXIS 4686 (N.D. Ill. Mar. 30, 1998).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 26, 1999. Plaintiffs' petition for rehearing en banc was denied in an

order entered October 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent portions of each of the following statutes are set forth in the Appendix hereto: 12 U.S.C. § 1715u (App., *infra* at 36a-38a), the Balanced Budget Downpayment Act, Pub. L. No. 104-99, 110 Stat. 26 (January 26, 1996) (App., *infra* at 39a-42a), and the Appropriations Act for the Departments of Veterans Affairs and Housing and Urban Development, Pub. L. No. 105-276, 112 Stat. 2461 (October 21, 1998) (App., *infra* at 43a-51a).

STATEMENT

In 1973, plaintiffs filed this nationwide class action against the United States Department of Housing and Urban Development ("HUD") and its Secretary, alleging that HUD was required by the National Housing Act (the "Act") and other federal housing legislation to provide mortgage foreclosure relief to homeowners who had received FHA-insured mortgages.

In August 1976, plaintiffs' class action was settled, and a consent decree was entered. The consent decree required HUD to operate a mortgage assignment program, pursuant to Section 230(a) of the Act, for all plaintiff class members with FHA-insured single-family home mortgages. Under the program, the mortgagee was required to inform homeowners of their right to apply for mortgage assignment prior to initiating foreclosure. If homeowners could demonstrate to HUD that they had fallen behind on the mortgage due to circumstances beyond their control and had a reasonable prospect of resuming regular payments within three years, HUD was obligated to take assignment of their mortgages and to pay the outstanding principal balances on the mortgages. HUD would then

enter into forbearance agreements with the homeowners, who, depending on their financial situations, would make reduced payments for up to three years, thereby avoiding foreclosure and saving their homes.

In 1979, in response to plaintiffs' allegations that HUD was violating the 1976 settlement agreement, the parties entered into a new settlement agreement, the "Amended Stipulation," which was entered by the court as an amended consent decree. Under the terms of the Amended Stipulation, HUD was required to run the mortgage assignment program for five years. HUD's duty thereafter was set forth in Paragraph 14 of the Amended Stipulation:

> The termination of the Department's specific obligations under this Amended Stipulation shall not diminish or compromise the Department's obligation construed under the National Housing Act, as amended, and Section 2 of the Housing Act of 1949 and Section 2 of the Housing and Urban Development Act of 1968 to provide foreclosure avoidance relief for mortgagors in temporary financial distress, and the Department shall provide assistance or relief in the form of the present assignment program or an equivalent substitute to permit mortgagors in default on their mortgages to avoid foreclosure and to retain their homes during periods of temporary financial distress.

App., *infra* at 20a-21a.

At the time HUD was negotiating the Amended Stipulation, it was also working on legislation to implement a substitute method of providing foreclosure relief. This new program, known as the Temporary Mortgage Assistance Payments ("TMAP") Program, was originally proposed for congressional enactment by HUD in 1979. The 1979 proposal was withdrawn, but HUD reintroduced TMAP in 1980.

Plaintiffs sought to hold HUD in contempt of court for introducing the TMAP legislation. Plaintiffs claimed that by proposing TMAP, HUD was violating its agreement, as set forth in the Amended Stipulation, to operate the assignment program for at least five years and thereafter to operate an equivalent program. At the initial hearing on plaintiffs' motion, the district court ruled that if HUD had "gone to the legislature to attempt to get the legislature to get them out of a commitment which they had made volunarily, in a consent decree," such conduct would constitute contempt. App., *infra* at 57a.

In March 1980, the district court held a full evidentiary hearing on plaintiffs' contempt motion. The court declined to find HUD in contempt, based on three findings.

First, HUD promised that the TMAP legislation would leave the assignment program intact for the full five years, as required by the Amended Stipulation. Second, the court found that based upon their "good faith obligations under the consent decree," HUD officials had advocated changes in the TMAP legislation so that it could be implemented as an "equivalent substitute" for the assignment program. This good faith obligation was confirmed by a HUD staff attorney who stated in a memorandum that if HUD were to propose a statutory replacement for the assignment program that was not a substantial equivalent, such action could be interpreted by the Court as evidence of bad faith. Third, HUD promised that if Congress were to enact legislation inconsistent with the continued operation of the consent decree, HUD would return to the district court to seek modification of the decree. HUD's Assistant Secretary for Housing testified that HUD would not attempt to implement a new program unless HUD first had concurrence from the district court that the program was not in derogation of the decree. *Ferrell v. Pierce*, 743 F.2d 454, 458-459 (7th Cir. 1984).

Congress subsequently passed the TMAP legislation. Section 341 of the legislation amended Section 230 of the Act, 12 U.S.C. § 1715u, and for the first time authorized HUD to offer a TMAP program. Housing and Community Development Act of 1980, Pub. L. No. 96-399, 94 Stat. 1614 (1980). HUD, pursuant to Fed. R. Civ. P. 60(b), moved to modify the 1979 Amended Stipulation so that it could implement the 1980 legislation. HUD argued that the enactment of the new statute authorizing TMAP was a change in law requiring modification of the decree.

The district court, after analyzing the new Section 230, denied HUD's motion. *Ferrell v. Pierce*, 560 F. Supp. 1044 (N.D. Ill. 1983). The Seventh Circuit affirmed, ruling that changed circumstances relieve a party of its consent decree obligations only when continued enforcement of the decree would constitute a grievous wrong and would therefore be inequitable. *Ferrell v. Pierce*, 743 F.2d 454, 464 (7th Cir. 1984). This requirement is satisfied where "a change in the law brings [the terms of the consent decree] in conflict with statutory objectives." *Id.*, citing *System Federation No. 91 v. Wright*, 364 U.S. 642, 65, (1961). Because HUD fell short, however, of demonstrating that its continued operation of the assignment program was inconsistent with its obligations under the new statute, the Seventh Circuit affirmed the district court's denial of HUD's motion. *Id.* HUD therefore continued to operate the assignment program, under which more than 85,000 plaintiff class members have avoided foreclosure and retained their homes since 1985.

In 1992, HUD officials again began working on a plan to replace the mortgage assignment program with a non-equivalent program, and, in 1995, HUD introduced and began lobbying Congress to enact such a program, namely, the "loss mitigation" program. On January 26, 1996, the

President signed into law the Balanced Budget Downpayment Act ("Downpayment Act"), Pub. L. No. 104-99, 110 Stat. 26. App., *infra* at 39a-42a. Section 407 of the Downpayment Act amended 12 U.S.C. § 1715u, removing HUD's statutory authority under Section 230 to operate the mortgage assignment program, except in cases where the mortgagee has modified the mortgage to cure a default. Section 407 also authorized HUD to operate a loss mitigation program in its place. 12 U.S.C. § 1715u(a) & (b).[1] App., *infra* at 36a-37a. Based on this new legislation, HUD refused to consider any applications for assignment received on or after April 26, 1996. HUD did not seek or obtain modification of the amended decree before terminating the assignment program, nor did HUD replace the assignment program with an equivalent substitute.

In September 1996, after plaintiffs informed HUD by letter that they intended to file a contempt petition, HUD filed a one-page motion to vacate the consent decree pursuant to Fed. R. Civ. P. 60(b). Five days later, on October 2, 1996, petitioners filed their contempt motion against HUD, alleging three grounds for contempt: (1) that HUD had lobbied Congress to eliminate the assignment program and to obtain authorization to operate a program that was not its substantial equivalent; (2) that HUD had teminated the mortgage assignment program without seeking and obtaining modification or vacation of the consent decree; and (3) that HUD had failed to operate the mortgage assignment program or an equivalent substitute, with the result that thousands of families who would have avoided foreclosure and retained their homes were instead losing their homes. The plaintiffs moved the

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[1] On April 26, 1996, the President signed into law H.R. 3019, the Omnibus Continuing Resolution, Pub. L. No. 104-134. Section 221 of this law corrected a technical error in the effective date provisions of § 1715u, setting the new effective date as April 26, 1996.

district court to issue preliminary injunctive relief requiring HUD to reinstate the assignment program or an equivalent substitute as required by Paragraph 14 of the Amended Stipulation, unless and until the district court vacated or modified the amended decree. The district court denied petitioners' initial motion, citing a lack of evidence of irreparable harm to the plaintiff class members. *Ferrell v. HUD*, 1996 U.S. Dist. LEXIS 17393, at *14 (N.D. Ill. Nov. 18, 1996).

On December 5, 1996, petitioners filed a renewed motion. Petitioners attached declarations and affidavits from numerous housing counselors and attorneys demonstrating that plaintiff class members were losing their homes through foreclosure where, in the past, these same homeowners would have been eligible for the mortgage assignment program and would therefore have been able to save their homes.

On March 30, 1998, the district court granted petitioners' renewed motion. The court credited plaintiffs unrebutted declarations and affidavits and found "that, as a result of the defendants' termination of the assignment program, "thousands of plaintiff class members who would have received relief and avoided foreclosure under the mortgage assignment program are now having their mortgage foreclosed and are losing their homes.'" App. *infra* at 31a.

According to the district court, petitioners therefore satisfied the three-pronged standard for obtaining preliminary injunctive relief: (1) some likelihood of prevailing on the merits; (2) the absence of an adequate remedy at law; and (3) the presence of irreparable harm. App., *infra* at 29a. The court ruled, first, that, "[g]iven the law on the issue of contempt and the defendants' blatant disregard of the court's order without seeking prior vacation of the order, it is likely that the plaintiffs will prevail

on the issue of contempt." App., *infra* at 32-33a. The court ruled, second, that "there is no adequate remedy at law for the loss of one's home as a result of the denial of foreclosure assistance." App., *infra* at 32a. The court ruled, third, "that the plaintiffs have presented compelling evidence that the members of the plaintiff class will suffer irreparable injury if the injunction is denied." App., *infra* at 31-32a. The district court therefore granted plaintiffs' renewed motion and issued a preliminary injunction requiring HUD to reinstate a mortgage assignment program or an equivalent substitute pending resolution of the ultimate merits of plaintiffs' contempt claims and HUD's Rule 60(b) motion.

HUD appealed the district court's issuance of the preliminary injunction. While the appeal was pending, Congress passed another relevant statute, the Appropriations Act for the Departments of Veterans Affairs and Housing and Urban Development, Pub. L. No. 105-276, 112 Stat. 2461 (October 21, 1998) ("1998 Act"). In this statute, Congress directed HUD to operate its "loss mitigation" program in a mandatory manner so as to require mortgagees to help mortgagors retain their homes. Relying in part on the 1998 Act but ignoring Congress' express direction that HUD require mortgagees to operate a mandatory loss mitigation program to help mortgagors retain their homes, the appeals court reversed, ruling that there was no chance that petitioners could prevail on the ultimate merits. The appeals court ruled that as of passage of the Downpayment Act, HUD was no longer required to run a mortgage assignment program or an equivalent substitute.

Petitioners sought rehearing en banc, which was denied in an order dated October 13, 1999. Petitioners then filed this petition within the prescribed ninety-day period.

REASONS FOR GRANTING THE PETITION

I. HUD MUST CONTINUE TO COMPLY WITH ITS OBLIGATIONS UNDER THE AMENDED CONSENT DECREE UNLESS AND UNTIL THE DISTRICT COURT VACATES OR MODIFIES THE DECREE.

In granting plaintiffs' motion for a preliminary injunction, the district court ruled that plaintiffs demonstrated a likelihood of success on their second and third grounds for contempt because HUD terminated the assignment program without first obtaining a court order allowing it to do so, and failed to operate a mandatory equivalent substitute program, such as a mandatory partial claim program, under Section 230(b) of the amended statute, 12 U.S.C. § 1715u(b).[2] The appeals court reversed, ruling

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[2] Evidence supporting plaintiffs' first ground for contempt—that HUD lobbied Congress to repeal the assignment program—was not before the district court when it issued its preliminary injunction because HUD refused to produce documents related to its lobbying activities. In June 1997, plaintiffs filed a motion to compel production of these documents, a motion that HUD vigorously opposed. However, in January 1998, Magistrate Judge Ira H. Levin, to whom the district court had referred issues relating to discovery, directed HUD to turn over to plaintiffs all documents relating to HUD's lobbying efforts, finding that "the documents withheld by Defendants may lead to relevant evidence regarding Plaintiffs' claims that HUD sought to obtain legislation freeing it from its obligations under the decree." *Ferrell v. HUD*, 177 F.R.D. 425, 430 (N.D. Ill. 1998). Shortly after the district court issued its preliminary injunction, HUD turned over some of the contested documents. Plaintiffs submitted some of the documents to the district court in support of their response to HUD's motion for a stay pending appeal. The district court stayed its injunctive order pending its ruling on HUD's motion for a stay pending appeal. However, the district court never ruled on HUD's motion for a stay, thereby effectively staying operation of its preliminary injunction pending the ruling by the Seventh Circuit on HUD's appeal. The parties have agreed before Magistrate Judge Levin to stay discovery on plaintiffs' lobbying claim pending resolution of the plaintiffs' petition for writ of certiorari. Therefore, the issue of whether HUD's

that the district court erred in issuing a preliminary injunction based on HUD's unilateral action. The appeal court ruled that the district court should instead have addressed plaintiffs' likelihood of success on the ultimate issue of whether HUD is authorized to run an assignment program or an "equivalent substitute" under current law. App. *infra* at 11a-12a.

The appeals court's ruling is in error. It completely ignores the well-established principle of law that parties to court decrees must comply with their obligations thereunder unless and until the applicable decree is vacated or modified by the issuing court, even if a change in law or circumstance ultimately requires the court to vacate the decree. This principle has been recognized by this Court in numerous cases, including *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), and *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976).

In *McComb*, the district court had entered a decree enjoining defendants from violating the Fair Labor Standards Act. 336 U.S. at 189. After defendant ignored the decree, the federal administrator instituted a civil contempt proceeding against defendant. In reversing the district court and Fifth Circuit opinions that refused to hold defendant in contempt, this Court stated:

> [I]f there were extenuating circumstances or if the decree was too burdensome in operation, there was a method of relief apart from [initial] appeal [of the judgment]. Respondents could have petitioned the District Court for a modification, clarification or construction of the order. But respondents did not take that course either. They undertook to make their

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lobbying activities constitute contempt, or whether plaintiffs have a likelihood of success on that claim, is not before the Court in this petition.

> own determination of what the decree meant. They knew they acted at their peril. . . . They took a calculated risk when under threat of contempt they adopted measures designed to avoid the legal consequences of the Act. Respondents are not unwitting victims of the law. Having been caught in its toils, they were endeavoring to extricate themselves. They knew full well the risk of crossing the forbidden line.

McComb, 336 U.S. at 192-193 (citation omitted).

Parties to court judgments are not free to determine for themselves whether a change in circumstance warrants violation of the judgment and then act on that determination. *Spangler*, 427 U.S. at 439, *citing United States v. United Mine Workers*, 330 U.S. 258 (1947) and *Walker v. City of Birmingham*, 388 U.S. 307 (1967). As long as a district court's order remains in effect, the court can enforce it through its inherent civil contempt power. *McComb*, 336 U.S. at 193. ("We are dealing here with the power of a court to grant the relief that is necessary to effect compliance with its decree. The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief.")[3]

Prior to the appeals court's decision of July 26, 1999, the Seventh Circuit had faithfully followed and applied this principle. In *Kindred v. Duckworth*, 9 F.3d 638 (7th Cir. 1993), defendants contended (as does HUD here) that the validity of a decree had been called into question by subsequent legislation, and it unilaterally ceased honoring its obligations under the decree. The district court denied plaintiff's subsequent contempt motion, but the Seventh Circuit reversed. The Seventh Circuit made clear

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[3] Thus, HUD can be required by the district court's inherent contempt power to operate a mortgage assignment program or an equivalent substitute on an interim basis until the district court rules on HUD's pending Rule 60(b) motion.

that an intervening statute that conflicts with a consent decree does not immediately abrogate the effect of the court decree, even if the statute (or any other change in circumstance) ultimately leads the court to modify or vacate the decree. Rather, "[a] continuing respect for the valid decrees of a court commands that they be obeyed until changed." *Kindred*, 9 F.3d at 644 (*citing Spangler*, 427 U.S. at 439-440 and *Walker v. City of Birmingham*, 388 U.S. 307 (1967)).

This long-standing principle of law was reiterated in *Komyatti v. Bayh*, 96 F.3d 95g (7th Cir. 1996). In *Komyatti*, the Seventh Circuit ruled that parties to a consent decree must abide by the terms of the decree until the district court determines the effect of any new legislation or other change in circumstances:

> The district court erred in several respects. First, *it should not have held that the proper course for the state officials was to ignore the provision with impunity. The appropriate course, Kindred teaches, would have been to seek an alteration of the decree from the district court.* Secondly, the district court [wrongly] assumed that the court could not retain, *and enforce through its contempt power*, any provision of the consent decree that could not be characterized as required by the Constitution itself.

Komyatti, 96 F.3d at 963 (emphasis added). As the *Komyatti* appeals court recognized, "the court expressed the usual course in *Kindred* when it wrote that a 'continuing respect for the valid decrees of court commands that they be obeyed until changed,' " that such an approach "is certainly compatible with the traditional approach of our law," and that "[s]uch an approach is also, we are pleased to say, most compatible with the traditions of our people and their commitment to a rule of law." *Komyatti*, 96 F.3d at 963.

The message of *McComb, Spangler, Kindred,* and *Komyatti* is loud and clear: a court decree must be obeyed unless and until modified or vacated. Until that time the court can—and should—enforce the decree through its inherent contempt power. The parties are simply not free to decide for themselves whether circumstances authorize them to disregard the obligations imposed by court order. If the law were as clear as HUD argues that it is, then HUD should simply have asked the district court to vacate the consent decree before unilaterally terminating the assignment program. HUD clearly knew from previous decisions of the district and appeals courts that this was the proper course of action. Therefore, the district court was correct; unless and until the court modifies or vacates the consent decree, the relevant substantive issue (i.e., the "merits" properly at issue in ruling on plaintiffs' motion for a preliminary injunction) is HUD's unauthorized unilateral action.

The appeals court fails to address or even cite *McComb, Spangler, Kindred,* or *Komyatti,* all repeatedly cited and relied upon by the petitioners. Instead, the appeals court adopted HUD's reliance upon *Collins v. Barry,* 841 F.2d 1297 (6th Cir. 1988). However, the cases are different both as to their procedural postures and as to the legal issues they present.[4] Moreover, apart from the procedural

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[4] In 1971 the *Collins* (district) court issued an injunction based on federal law prohibiting the state of Ohio from counting a family's Social Security income in determining eligibility for AFDC (Aid to Families with Dependent Children). Then, in 1984, based on a new statute, the Ohio state welfare agency began counting such income. Collins sought to hold defendant in contempt; the state cited the new statute as pre-empting the dictates of the earlier injunction.

The appeals court ruled that plaintiffs were no longer entitled to the benefits of the prior injunction, and that the state actors could therefore not be held in contempt. *But this was after the district court held a full Rule 60(b) motion hearing and issued a ruling,*

differences, *Collins* is simply wrong in failing to hold the defendant in contempt, as that court's ruling conflicts with *McComb, Spangler* and their progeny.

The other cases relied upon by the appeals court are likewise inapposite. App., *infra* at 17a. Each of those cases, such as *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735 (7th Cir. 1976), stands for the principle that a judgment of civil contempt no longer has force *once a substantive determination has been made that the underlying order is no longer valid.* So, in *Squillacote*, the Seventh Circuit declined to invalidate a contempt finding *because the underlying order was still valid at the time of the contested actions.* 534 F.2d at 746. Similarly, in this case, HUD terminated the assignment program before the underlying order (the Amended Stipulation) had been invalidated. Indeed, the Amended Stipulation still has not been invalidated. Unless and untill the district court invalidates the decree, HUD must obey the amended decree—and the relevant "merits" determination for the purposes of plaintiffs' motion for a preliminary injunction is HUD's refusal to do so.

In sum, the appeals court's decision encourages lawlessness rather than respect for the rule of law. HUD knew perfectly well the proper procedure it was required to follow, having followed that procedure when it sought to

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which was then appealed. In addition, the appeals court ruled in *Bradley v. Austin*, 841 F.2d 1288 (6th Cir. 1988) (issued the same day as *Collins*) that the new federal law authorized state welfare agencies to count Social Security income in calculating AFDC eligibility. The appeals court in *Collins* ruled that it was bound by the determination in *Bradley*. Thus, the appeals court made its ruling (of non-contempt) based upon a prior substantive determination of the underlying merits. That, of course, is precisely what is lacking here: the district court *has never made a Rule 60(b) determination* whether (and, if so, how) the *Ferrell* consent decree should be modified.

vacate the amended decree based on passage of the TMAP legislation. This time around, HUD had ample opportunity to seek and obtain the district court's approval to modify or vacate the consent decree. Instead, it "crossed the forbidden line" and took the law into its own hands. It unilaterally determined the effect of the new law on the consent decree, which action has by now cost over 45,000 plaintiff class members their homes. Unless the appeals court's incorrect decision is changed, it will strongly encourage similarly reckless and similarly harmful behavior from other government agencies in the future.

II. THE APPEALS COURT IMPROPERLY FORECLOSED THE DISTRICT COURT'S DETERMINATION OF THE ULTIMATE MERITS.

On review of the district court's decision, the appeals court had a limited task: to determine whether the district court abused its discretion in entering a preliminary injunction requiring HUD to reinstate the mortgage assignment program or to operate an equivalent substitute. App., *infra* at 10a. However, by reaching beyond that limited issue, the appeals court's decision appears to bar the district court from determining the underlying merits of the case pursuant to Fed. R. Civ. P. 60(b), thus bypassing the analysis required by this Court in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992). The appeals court went even further, interpreting provisions of the 1998 amendment to Section 230, 12 U.S.C. § 1715u, which the district court did not have the opportunity to decide, or even consider, and which the parties have never had the opportunity to litigate in the district court. App., *infra* at 6a-7a. The appeals court thus erred by misconstruing the limited nature of its review.

A. The Appeals Court Should Have Remanded For The District Court To Conduct A Full Hearing On The Merits Under *Rufo*.

Modification of a consent decree requires a "complete hearing and findings of fact." *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981); *Ferrell*, 743 F.2d at 460 (in deciding HUD's motion to modify, the district court held an evidentiary hearing and entertained numerous briefs). In *Rufo*, this Court set forth a two-pronged approach for the district courts to follow in deciding Rule 60(b) motions in institutional reform cases. *Rufo*, 502 U.S. at 391. First, the moving party must establish a change in either fact or law warranting modification. *Id.* If the moving party meets that burden, the district court must then decide whether the proposed modification is suitably tailored to the changed circumstances. *Id.* As this Court observed, "The court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires." *Id.*

A district court's determination under Rule 60(b)(5) is a task that necessarily entails substantial discretion. *Rufo*, 502 U.S. at 393-94 (O'Connor, J., concurring). The district court must make "complex decisions requiring the sensitive balancing of a host of factors," and is thus entitled to substantial deference, particularly in institutional reform cases. *Id.*, *see also Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) (district court in institutional reform case has the "personal knowledge, experience, and insight necessary to evaluate the parties' intentions, performances, and capabilities.")

Therefore, the appeals court should examine primarily the method in which the district court reached its decision, not the substantive outcome the court reaches. *Rufo*, 502 U.S. at 394. If the method was appropriate, the appeals court should affirm even if it would have reached a dif-

ferent decision. *Id.* If the method employed by the district court was flawed, the appeals court should send the case back for a re-determination under the appropriate standard. *Id.* at 396. This is because "[d]istrict judges need a substantial measure of discretion to deal with consent decrees, and with discretion comes deferential appellate review." *Evans v. City of Chicago,* 10 F.3d 474, 482 (7th Cir. 1993); *Ferrell,* 743 F.2d at 461; *Credit Alliance Corp. v. Campbell,* 845 F.2d 725, 727 (7th Cir. 1988).

Here, the district court never even reached the *Rufo* analysis; the sole issue the district court decided was that plaintiffs were entitled to preliminary relief because HUD had acted unilaterally in terminating the mortgage assignment program and replacing it with a non-equivalent program, without first seeking and obtaining court approval. Instead of limiting its review to that issue, the appeals court made its own determination of the merits, finding that plaintiffs had "no" likelihood of success on the merits, since—according to the appeals court's own interpretation of the 1996 and 1998 amendments to Section 230—HUD could no longer be required to run a mortgage assignment program or an equivalent substitute. App., *infra* at 15a-17a. In addition, because the 1998 amendment was enacted after the case was submitted for appeal, the district court did not have the opportunity to construe the newly amended Section 230 in the first instance. The correct action would have been to remand to the district court to conduct the full Rule 60(b) inquiry mandated by *Rufo.*

Both this Court and the Seventh Circuit, mindful of the deference due the district court in institutional reform cases, have previously declined to decide whether a new law required modification of a consent decree, instead remanding the case back to the district court. *See Rufo,*

502 U.S. at 384; *Komyatti*, 96 F.3d at 956-57; *Kindred*, 9 F.3d at 639; *Sasnett v. Sullivan*, 91 F.3d 1018, 1023 (7th Cir. 1996); *United States v. City of Chicago*, 978 F.2d 325, 334 (7th Cir. 1992).

The difficulty and novelty of an issue not yet decided by the district court are factors counseling against initial consideration on appeal. *See Ferrell*, 743 at 463 (declining to decide whether TMAP could go into effect after five-year period in the Amended Stipulation expired, as the issue had not yet been decided by the district court); *Western Transportation Co. v. Webster City Iron & Metal Co.*, 657 F.2d 116, 119 (7th Cir. 1981) (district court can "expose and distill" subtleties of issue to facilitate more informed appellate consideration). Here, the 1998 amendment dramatically altered Section 230, lending further support for plaintiffs' argument that HUD has the authority to implement a foreclosure avoidance program that is substantially equivalent to the mortgage assignment program. *See* Part III, *infra*. Based on this Court's own precedents, the appeals court should have remanded for the district court to perform a *Rufo* analysis, including a full and complete consideration of the 1998 amendment.

B. The Appeals Court Misapprehended The Limited Nature Of Appellate Review Of Preliminary Injunctive Relief.

The appeals court's decision appears to dispose of the case as a whole, thus improperly equating "likelihood of success" with "success" on the merits. *See University of Texas v. Camenisch*, 451 U.S. 396, 394 (1981). Such a misconception ignores the significant procedural differences between preliminary injunctions and a decision on the ultimate merits. The purpose of the preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. *Id.* at 394-

95; *Doeskin Products, Inc. v. United Paper Co.*, 195 F.2d 356 (7th Cir. 1952). Where, as in this case, one party has presumed to change the status quo, the function of a preliminary injunction is to restore the parties to their orginal positions pending the court's determination whether the status quo should be changed. A party is not required to prove his case in full at a preliminary injunction hearing; thus, a preliminary injunction is usually granted on the basis of "procedures that are less formal and evidence that is less complete than a full trial, and is not equivalent to a judgment on the merits." *Camenish*, 451 U.S. at 395; *Technical Publishing Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984); *Hunter v. Atchison*, 188 F.2d 294, 299 (7th Cir. 1951) (district court improperly assumed evidence at final hearing would be same as that presented at preliminary injunction hearing). In reviewing the grant or denial of a preliminary injunction, the appellate court must employ the "abuse of discretion" standard. *O'Connor v. Board of Ed. Of School District 23*, 645 F.2d 578, 580 (7th Cir. 1981) (citations omitted).

The Seventh Circuit itself has repeatedly stated that an appellate court should not reach issues going to the ultimate merits on appeal from an order granting preliminary injunctive relief. *Doeskin Products*, 195 F.2d at 361; *Bath Industries, Inc. v. Blot*, 427 F.2d 97, 111 (7th Cir. 1970).[5] The Seventh Circuit has observed:

> It is well settled that an application for interlocutory injunction may not be availed of to secure a piece-

[5] Fed. R. Civ. P. 65(a)(2) permits a court to order a trial on the merits to be consolidated with hearing on a preliminary injunction motion, but only where the parties have "clear and unambiguous notice at a time which will still afford the parties a full opportunity to present their respective cases." *See Camenisch*, 451 U.S. at 395. Since no such notice was given, the rule is not applicable in this case.

> meal trial *nor as a means whereby an opinion as to the applicable law may be extracted from the appellate court in advance of final hearing.* Advantageous though this might be to the parties in some cases, *the proper administration of justice requires . . . that the appellate court have the case completely before it when it declares the law applicable thereto.*

Doeskin Products, 195 F.2d at 361 (quoting *Meiselman v. Paramount*, 180 F.2d 94, 96 (4th Cir. 1950)) (emphasis added); *see also Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940) (holding that three-judge district court improperly decided constitutionality of underlying statute in motion for preliminary injunction).

The grant or denial of a preliminary injunction does not amount to an adjudication of the ultimate merits. *Hunter*, 188 F.2d at 298; *O'Connor*, 645 F.2d at 583 (although plaintiff did not establish likelihood of success on merits of distrimination claim sufficient to support preliminary injunction, case was remanded for full trial on merits). Findings of fact and conclusions of law made in deciding a preliminary injunction, therefore, are not binding at a trial on the merits. *Camenisch*, 451 U.S. at 395; *Doeskin Products*, 195 F.2d at 361.

Thus, if the appeals court believed the district court's grant of preliminary relief was an abuse of discretion, then the appeals court should have dissolved the injunction and remanded for the district court to conduct a hearing on the merits. *See O'Connor*, 645 F.2d at 583. By failing to limit its inquiry in accordance with this Court's precedents, the appeals court effectively usurped the district court's determination of the ultimate merits: whether, in light of recent changes to Section 230—particularly the 1998 amendment, which was never even considered by the district court—the amended consent decree should be modified or vacated under Rule 60(b).

III. THE APPEALS COURT MISCONSTRUED THE IMPACT OF THE 1998 AMENDMENT TO SECTION 230.

Even assuming that the appeals court correctly reached the ultimate merits *and* correctly determined that HUD no longer has the statutory authority to run an assignment program under Section 230(c), 12 U.S.C. § 1715u (c), or a mandatory partial claim program under Section 230(b), 12 U.S.C. 1715u(b),[6] the appeals court erred in failing to recognize and acknowledge that HUD now has the statutory authority to run an equivalent (loss mitigation-based) foreclosure-avoidance program under the amended Section 230(a), 12 U.S.C. § 1715u(a).

In its opinion, the appeals court focused almost exclusively on whether the 1996 amendment to Section 230 "has rended HUD's continued operation of *the mortgage assignment program* statutorily unauthorized." App., *infra* at 15a (emphasis added). The appeals court virtually ignored the equally relevant question of whether, in light of the 1998 amendment to Section 230, HUD now has the statutory authority to run another mortgage foreclosure avoidance program (i.e., "an equivalent substitute") consistent with its obligations under the Amended Stipulation. It is essential to understand that the ultimate purpose of the Amended Stipulation was not to require HUD to run an assignment program per se, but rather to administer a high-quality mortgage foreclosure-avoidance program that would allow class members to retain their homes.

The appeals court asserts that the amended Section 230 does not permit HUD to run a program "equivalent" to the assignment program, but only a program that is "as equiv-

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[6] Petitioners do not concede that these rulings by the Seventh Circuit were correct; they simply do not need to address them in the context of this petition for a writ of certiorari.

alent as possible to the assignment program," and that therefore "the new legislation does not mandate the establishment of a program that would comply with the Amended Stipulation." App., *infra* at 15a. This reasoning conflicts with *Rufo*, 502 U.S. at 391, which requires the district court to determine whether a proposed modification of the consent decree "is tailored to resolve the problems created by the change in circumstances." Thus, under *Rufo*, it is not an "all or nothing" approach as suggested by the appeals court, but rather, given the change in law, whether HUD still has statutory authority to run some kind of program pursuant to the Amended Stipulation.[7]

The appeals court focused on only one form of possible equivalent substitute: the partial claim program under Section 230(b), 12 U.S.C. § 1715u(b). The appeals court decided the question of whether "HUD still retains authority to operate an 'equivalent substitute' in the form of a mandatory partial claim program under [Section 230 (b)]." App., *infra* at 14a. It found that HUD did not,

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[7] For example, if Congress had changed the assignment program to permit HUD to offer only 24 months of forbearance relief, rather than 36 months as in the assignment program required under the Amended Stipulation, *Rufo* would require the Amended Stipulation to be modified to require HUD to provide 24, rather than 36 months of relief. Under *Rufo* the Amended Stipulation would not be changed to permit HUD to offer no relief at all, as footnote 6 to the appeals court's decision implies. *See also Ferrell v. Pierce*, 560 F. Supp. 1344, 1360 (N.D. Ill. 1983), *aff'd* 743 F.2d 454 (7th Cir. 1984) ("[W]e have no difficulty in concluding that the effect of those provisions of the Amended Stipulation that we have set out above is also to require that the TMAP program be implemented in manner *which will provide foreclosure avoidance relief as nearly as equivalent to that available under the assignment program as is consistent with the amended statute*" (emphasis added), *citing White v. Roughton*, 689 F.2d 118, 119-120 (7th Cir. 1982) (courts must construe a consent decree not with narrow, mechanical reference to its letter alone, but in light of its spirit and purposes).

because, according to the appeals court, the partial claim program "is permissive, not mandatory, in nature." App., *infra* at 15a. The appeals court totally ignored the question of whether the 1998 amendment to Section 230(a) permits HUD to run another type of mandatory program, such as a mandatory "special forbearance" program, or a mandatory "[loan] modification" program. *See* Section 230(a), now codified at 12 U.S.C. § 1715u(a) (Supp. 1999) ("Upon default of any mortgage insured under this section, *mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure* (including but not limited to actions such as special forbearance, [loan] modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under [Section 204 of the National Housing Act]) as provided in regulations by the Secretary.") (emphasis added). App., *infra* at 36a.

The language of revised Section 230(a) specifically requires the Secretary of HUD to revise and make mandatory its loss mitigation program by issuing regulations to enforce these new requirements on mortgages. This mandate to the Secretary is elaborated upon by the legislative history of the revised Section 230(a):

> *The conferees wish to impress upon HUD the importance of an aggressive and effective loss mitigation program. Such a program could keep families in their homes longer and would, most certainly, decrease losses to the FHA insurance fund.* Currently HUD's mortgage services have no affirmative duty to undertake loss mitigation activities. *Therefore, the conference agreement has included language requiring loss mitigation upon default of a mortgage.*

144 Cong. Rec. H9437 (daily ed. Oct. 5, 1998) (emphasis added). App., *infra* at 52a-53a.

The Seventh Circuit held in 1984 in this case that if HUD can implement an equivalent substitute " 'ac-

cording to the Amended Stipulation' without violating the new statute . . . [then HUD does not meet] the well established standards for the modification of a decree on account of a change in the law—that the change in law has brought the decree *in conflict* with statutory objectives." *Ferrell*, 743 F.2d at 464, *citing System Federation No. 91 v. Wright*, 364 U.S. at 651 (1961). Even assuming that the appeals court is correct that Congress in 1996 eliminated HUD's authority to run a mandatory mortgage assignment program or a mandatory partial claim program, it is clear that by 1998, Congress was unhappy with the way HUD was providing mortgage foreclosure-avoidance relief under the *voluntary* loss mitigation program Congress substituted for the mandatory mortgage assignment program in 1996. By enacting the 1998 amendment to Section 230, Congress intended that HUD revise its mortgage foreclosure-avoidance programs and begin to operate a *mandatory* loss mitigation program in such a manner that would keep families in their homes.

The appeals court acknowledges that the 1998 amendment "require[s] the mortgagees [to] shoulder a greater burden in assisting mortgagors in financial distress by employing a variety of foreclosure avoidance and loss mitigation techniques, not including assignment of mortgage to the Secretary under the former program." App., *infra* at 7a. Under the 1998 amendment to Section 230, HUD is directed to issue regulations to require the mortgagees to offer foreclosure avoidance relief to keep people in their homes. Thus, HUD now has statutory authority to operate a *mandatory* program of foreclosure avoidance relief that would satisfy *both* Congress' objective to "keep families in their homes" *and* the Amended Stipulation's requirement to "provide assistance or relief in the form of the present assignment program or an equivalent substitute to permit mortgagors in default on their mortgages to avoid foreclosure and to retain their homes during

periods of temporary financial distress." Under such a program HUD would require mortgagees to provide homeowners with "special forbearance" or "loan modification" relief.

Under special forbearance, the mortgagee would be required to allow the mortgagor to pay reduced payments for a period of time and then repay arrearages under a forbearance plan in order to avoid losing the home through foreclosure. Under loan modification, the mortgagee would be required to re-amortize the loan to include missed payments as principal in a new mortgage. Under either approach, the homeowner would avoid foreclosure and remain in the home. Accordingly, HUD can implement a loss mitigation program pursuant to the Amended Stipulation that would provide relief "equivalent" to that provided by the assignment program without violating the amended Section 230.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2361

JAMES D. FERRELL, JOYCE A. FERRELL, and JOHNNIE D. BROWN, et al., individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,
v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and ANDREW CUOMO, Secretary, United States Department of Housing and Urban Development,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 73 C 334—David H. Coar, Judge

ARGUED DECEMBER 3, 1998—DECIDED JULY 26, 1999

Before POSNER, *Chief Judge*, and CUDAHY and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* When the Balanced Budget Downpayment Act became effective in 1996, the United

States Department of Housing and Urban Development ("HUD") terminated a mortgage foreclosure relief program that it had been operating pursuant to a consent decree since 1976. The district court granted a preliminary injunction requiring HUD to reinstate the program or an equivalent substitute until further order from the court. For the reasons set forth in the following opinion, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

I

BACKGROUND

A. Factual and Procedural Background

In 1973, the plaintiff class filed suit against the Sceretary of Housing and Urban Development ("the Secretary"). The plaintiffs alleged that HUD was statutorily required by the National Housing Act and other federal housing legislation to provide mortgage foreclosure relief to homeowners with HUD-insured mortgages. *See Ferrell v. Pierce*, 743 F.2d 454, 455-56 (7th Cir. 1984). The parties reached a settlement agreement, which was entered as a consent decree with the district court's approval in 1976. *See id.* at 457. The consent decree incorporated a detailed plan for HUD to fulfill its obligation to provide foreclosure avoidance relief through the operation of a mortgage assignment program. *See id.* A mortgage assignment program provides foreclosure relief by allowing HUD to pay off the mortgage debt of a mortgagor in default, take assignment of the mortgage from the mortgagee, and then work out a payment plan for forbearance agreement with the mortgagor. *See id.* at 456.

In 1979, with the court's approval, the parties agreed to an Amended Stipulation, which superseded the consent

decree. The Amended Stipulation imposed specific procedural and substantive restraints on HUD's operation of the mortgage assignment program. The Amended Stipulation also provided that, after the five-year period following the entry of the Amended Stipulation, HUD must continue to "provide assistance or relief in the form of the present assignment program or an equivalent substitute to permit mortgagors in default on their mortgages to avoid foreclosure and to retain their homes during periods of temporary financial distress." *Id.* at 458. At the time of the Amended Stipulation, the statutory authority for HUD's operation of the mortgage assignment program was contained in the former Section 230 of the National Housing Act, 12 U.S.C. § 1715u (1968). *See Ferrell v. Pierce,* 560 F. Supp. 1344, 1350 (N.D. Ill. 1983).

Subsequently, Congress enacted the Housing and Community Development Act of 1980, Pub. L. No. 96-399, 94 Stat. 1614, 1659, which amended Section 230 of the National Housing Act to authorize HUD to provide foreclosure avoidance relief in the form of Temporary Mortgage Assistance Payments ("TMAP") in addition to the mortgage assignment program. *See Ferrell,* 560 F. Supp. at 1350. TMAP differed from the mortgage assignment program in that it allowed HUD to take over temporarily part or all of the mortgagor's payments and to make those payment to the mortgagee directly, rather than paying off the entire mortgage and taking assignment of the mortgage. *See id.* In 1983, HUD promulgated regulations to implement TMAP and sought to modify the 1979 Amended Stipulation to allow HUD to operate TMAP and the mortgage assignment program simultaneously. *See id.* at 1354-55. The district court denied HUD's motion to modify the consent decree, concluding that the

new regulations would lower the overall quality of relief available, thus violating the requirement in the Amended Stipulation that HUD continue to provide the mortgage assignment program or an equivalent substitute. *See id.* at 1363-64, 1371-72.[1] This court affirmed. *See Ferrell*, 743 F.2d at 466.

In 1996, Congress enacted the legislation at issue in this appeal—the Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, 110 Stat. 26 (Jan. 26, 1996) ("the Downpayment Act"). Section 407 of the Downpayment Act amended Section 230 of the National Housing Act, 12 U.S.C. § 1715u (1988). The former Section 230, titled "Temporary mortgage assistance payments and acquisition of mortgages to avoid foreclosure," authorized the Secretary to operate TMAP and the mortgage assignment program. The amended Section 230, 12 U.S.C. § 1715u (Supp. 1999), titled "Authority to assist mortgagors in default," authorizes the Secretary to operate a partial claim program[2] and to accept assignments of defaulted mortgages when the mortgagee has modified

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[1] The district court concluded that Congress, in enacting the statutory changes in 1980, did not intend the amendments to supersede the Amended Stipulation's requirement that HUD continue to provide the mortgage assignment program or an equivalent substitute. *See Ferrell*, 560 F. Supp. at 1360. In the court's view, nothing in the statutory changes *required* the implementation of TMAP or required any modification of the Amended Stipulation. *See id.* The court noted that, "[i]f Congress desires to repeal the [mortgage assignment] program for the future, it certainly can do so." *Id.* at 1372. However, until that time, the court's ruling precluded HUD from providing any program less advantageous to mortgagors than the assignment program.

[2] Under a partial claim program, HUD would pay a partial claim to a mortgagee that agrees to apply the payment to a mortgage that is in default; the mortgagor would then agree to repay HUD for the amount of the partial claim payment. *See* 12 U.S.C. § 1715u(b) (Supp. 1999).

the mortgage to cure the default and to provide for mortgage payments within the mortgagor's reasonable ability to pay. *See id.* § 1715u(b) & (c).

The amended Section 230 also requires mortgagees to engage in certain loss mitigation actions to provide alternatives to foreclosure upon the default of any HUD-insured mortgage but expressly excludes from such required actions the assignment of mortgages to the Secretary. *See id.* § 1715u(a). Notably, the new Section 230 provides that "[n]o provision of this chapter, or any other law, shall be construed to require the Secretary to provide an alternative to foreclosure for mortgagees with mortgages . . . insured by the Secretary under this chapter, or to accept assignments of such mortgages." *Id.* § 1715u(f). The section also provides that "[n]o decision by the Secretary to exercise or forego exercising any authority under this section shall be subject to judicial review." *Id.* § 1715u(d).

Additionally, Section 407 of the Downpayment Act amended Section 204(a) of the National Housing Act, 12 U.S.C. § 1710(a), to authorize the Secretary to pay insurance benefits to a mortgagee in recompense for actions taken to provide alternatives to foreclosure of a defaulted mortgage, but excluded from those recompensable actions the assignment of a mortgage to the Secretary.

As of April 26, 1996, the effective date of the Downpayment Act, HUD stopped accepting applications for mortgage assignment. HUD then promulgated an interim regulation, effective August 2, 1996, establishing a comprehensive approach to foreclosure avoidance and loss mitigation. In accordance with the Downpayment Act's amendments to the National Housing Act, the interim regulation provided for a variety of foreclosure avoidance

and loss mitigation techniques, including special forebearance plans, loan modifications, partial claims, pre-foreclosure sales, and deeds in lieu of foreclosure. *See* 61 Fed. Reg. 35014 (July 3, 1996). The regulation encouraged private lenders to use these techniques with mortgagors in default and made available insurance benefites to lenders whose efforts result in outcomes other than foreclosure.[3]

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[3] Since this appeal was filed, Congress has enacted additional legislation that bears on this litigation. On October 21, 1998, Congress enacted the Veterans Affairs and HUD Appropriations Act, Pub. L. No. 105-276, 112 Stat. 2461 (Oct. 21, 1998) ("the Appropriations Act").

The new Appropriations Act further amended Section 204 of the National Housing Act (12 U.S.C. § 1710). The new Section 204(a)(1)(A) (12 U.S.C. § 1710(a)(1)(A)) provides that the Secretary may pay insurance benefits for the assignment of a mortgage to the Secretary under certain conditions. However, the new Section 204(a)(9) (12 U.S.C. § 1710(a)(9)) makes clear that Congress intended to terminate the mortgage assignment program as it existed under the Amended Stipulation. Section 204(a)(9), titled "Treatment of mortgage assignment program," states:

> Notwithstanding any other provision of law, or the Amended Stipulation entered as a consent decree on November 8, 1979, in Ferrell v. Cuomo, No. 73 C 334 (N.D. Ill.), or any other order intended to require the Secretary to operate the program of mortgage assignment and forbearance that was operated by the Secretary pursuant to the Amended Stipulation and under the authority of section 230 [12 U.S.C.A. § 1715u], prior to its amendment by section 407(b) of The Balanced Budget Downpayment Act, I (Public Law 104-99; 110 Stat. 45) [Pub. L. 104-99, Title IV, § 407(b), Jan. 26, 1996, 110 Stat. 45], no mortgage assigned under this section may be included in any mortgage foreclosure avoidance program that is the same or substantially equivalent to such a program of mortgage assignment and forbearance.

12 U.S.C. § 1710(a)(9) (Supp. 1999).

The new Section 204(a)(2) (12 U.S.C. § 1710(a)(2)) largely repeats the provisions of the former Section 204(a), authorizing HUD to pay insurance benefits to mortgagees that engage in loss mitigation efforts, including special forbearance, loan modification,

B. Proceedings in the District Court

On September 27, 1996, HUD filed a motion to vacate its obligation under the Amended Stipulation to operate the mortgage assignment program or an equivalent substitute. On Ocober 2, 1996, the plaintiffs filed a motion to hold HUD in civil contempt for failing to comply with the Amended Stipulation. The plaintiffs' motion included a request that the district court order HUD to reinstate the assignment program or an equivalent substitute pending the court's ruling on HUD's motion to vacate the Amended Stipulation. The district court treated the request for reinstatement as a motion for a preliminary injunction and agreed to rule first on that issue while the other motions remained under consideration.

On November 21, 1996, the district court issued a memorandum opinion and order denying plaintiffs' request for reinstatement of the assignment program on the ground that the plaintiffs had not presented evidence of irreparable injury, which is required to grant a preliminary injunction. The plaintiffs subsequently filed a re-

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and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under Section 204(a)(1)(A) (12 U.S.C. § 1710(a)(1)(A)).

Section 204(f) of the Appropriations Act amends Section 230 of the National Housing Act (12 U.S.C. § 1715u) to *require* mortgagees to engage in loss mitigation actions but excludes from such actions the assignment of mortgages to the Secretary under Section 204(a)(1)(A) (12 U.S.C. § 1710(a)(1)(A)). *See* 12 U.S.C. § 1715u(a) (Supp. 1999).

In sum, the new Appropriations Act evidences Congress' intent that HUD cease operating the mortgage assignment program previously required by the Amended Stipulation and that mortgagees shoulder a greater burden in assisting mortgagors in financial distress by employing a variety of foreclosure avoidance and loss mitigation techniques, not including assignment of mortgages tc the Secretary under the former program.

newed motion supported by evidence of irreparable harm that would result from HUD's termination of the assignment program. The district court's grant of this motion is the subject of the present appeal.

C. Holding of the District Court

On March 31, 1998, the district court issued a memorandum opinion and order granting a preliminary injunction against HUD. The preliminary injunction required HUD to reinstate "either the assignment program or an 'equivalent' substitute, in the form of a mandatory partial claim program, until further order from [the] court." *Ferrell v. HUD*, No. 73 C 334, 1998 WL 160916, at *8 (N.D. Ill. Mar. 31, 1998).

The district court first held as a preliminary matter that, even after Section 407(a) of the Downpayment Act withdrew the express statutory authority for the operation of the mortgage assignment program, HUD still retained the authority to operate the program or an equivalent substitute. The court concluded that, "[a]lthough statutory authority to operate the assignment program is no longer found in 12 U.S.C. § 1710(a), such authority may be found in other statutory provisions." *Ferrell*, 1998 WL 160916, at *5. Specifically, the court found that 42 U.S.C. § 1441 and 42 U.S.C. § 3535, when read together, provide authorization for HUD's continued operation of the assignment program.[4] The court further concluded that HUD also retains statutory authority to operate an equivalent substitute in the form of a mandatory partial claim program pursuant to 12 U.S.C. § 1715u (b).

The district court then addressed a second preliminary issue—whether the court had the power to order HUD to comply with the Amended Stipulation, given that the

Downpayment Act both specifically precludes judicial review of any decision by the Secretary regarding assistance to mortgagors in default, *see* 12 U.S.C. § 1715u(d) (Supp. 1999), and provides that no law shall be construed to require the Secretary to provide an alternative to foreclosure or to accept mortgage assignments, *see id.* § 1715u(f). The court held that the Downpayment Act did not alter HUD's obligation to seek modification of the Amended Stipulation by the court before terminating the assignment program. *See Ferrell*, 1998 WL 160916, at *5. The court emphasized that "court orders remain effective until they are modified by the court" and that litigants must observe the proper judicial procedures by moving to vacate orders, even when such orders are void. *Id.*

The district court then reached the issue whether to grant a preliminary injunction requiring HUD to reinstate the mortgage assignment program or an equivalent substitute. The court concluded that the plaintiffs had satisfied the standard for a preliminary injunction by demonstrating some likelihood of success on the merits, the absence of an adequate remedy at law, and irreparable harm if the preliminary injunction were not granted. First, the court noted that the plaintiffs had submitted compelling and unrebutted evidence of irreparable injury

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[4] 12 U.S.C. § 1441 declares the national housing policy "goal of a decent home and a suitable living environment for every American family" and directs HUD to exercise its powers, duties, and functions consistently with that policy. 42 U.S.C. § 3535 provides HUD with general authority to "make such rules and regulations as may be necessary to carry out [the Secretary's] functions, powers, and duties," authorizes the Secretary to sell or exchange securities or obligations, and permits the Secretary to consent to the modification of any term of any contract or agreement to which he is a party or which has been transferred to him. *See id.* § 3535(d), (i)(3), (i)(5).

to class members who would lose their homes if the assignment program were not reinstated. Second, the court found that no adequate remedy at law exists for the loss of one's home due to the denial of foreclosure assistance. Third, the court found that the plaintiffs were likely to prevail on the merits of their contempt motion, given HUD's failure to petition the court for modification of the Amended Stipulation before terminating the assignment program. *See id.* at *7-8. The district court therefore granted the plaintiffs' motion for a preliminary injunction requiring HUD to reinstate the assignment program or an equivalent substitute in the form of a mandatory partial claim program until further order from the court. *See id.* at *8.

II

ANALYSIS

A. Applicable Standards

When deciding whether to grant or deny a preliminary injunction, a district court must consider whether the moving party has demonstrated (1) some likelihood of prevailing on the merits, (2) the absence of an adequate remedy at law, and (3) irreparable harm if preliminary relief is not granted. *See Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1291-92 (7th Cir. 1996), *cert. denied*, 520 U.S. 1230 (1997); *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067 (7th Cir. 1994). If the court is satisfied that these factors have been established, the court must then balance the harms to both parties using a "sliding scale" analysis: the greater the moving party's likelihood of prevailing on the merits, the less strongly it must show that the balance of harms weighs in its favor. *See Storck U.S.A., L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir. 1994; *see also AlliedSignal, Inc. v. B.F. Goodrich Co.*, No.

99-2098, 1999 WL 446849, at *4 (7th Cir. June 23, 1999); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1453 (7th Cir. 1995). The court must also consider the public interest by weighing the effect that either granting or denying the injunction will have on nonparties. *See Erickson*, 13 F.3d at 1067.

When reviewing a grant or denial of a preliminary injunction, we review the district court's findings of fact for clear error and its discretionary balancing of factors for abuse of discretion. *See Grossbaum*, 100 F.3d at 1292. The district court's legal conclusions are subject to de novo review. *See id.*

B. Likelihood of Prevailing on the Merits

1.

We note at the outset that the substantive "merits" of this case boil down to the basic question whether HUD should be required to continue operating the mortgage assignment program as it existed under the Amended Stipulation. The district court defined the "merits" as the plaintiffs' contempt motion. *See Ferrell*, 1998 WL 160916, at *7. Accordingly, in determining the plaintiffs' likelihood of prevailing on the merits thus defined, the district court focused on HUD's procedural shortcomings in failing to move promptly to vacate the Amended Stipulation before terminating the assignment program. The court found that the plaintiffs would likely prevail on the issue of contempt, given HUD's "blatant disregard of the conrt's order without seeking prior vacation of the order." *Id.* at *8.

We believe that, in assessing the probability of success on the merits, the district court should have focused on the plaintiffs' ultimate request that HUD continue to operate the mortgage assignment program or an equiva-

lent substitute in accordance with the Amended Stipulation. It is the likelihood of prevailing on the merits of this request that might justify a preliminary injunction requiring HUD to reinstate the program pending resolution of the underlying motions. Even if HUD might be found in contempt for its delay in seeking modification of the Amended Stipulation, this shortcoming would not justify a preliminary injunction unless it is also true that the plaintiffs have some likelihood of prevailing on the ultimate issue of HUD's obligation to continue the assignment program. If there is no likelihood that HUD can be required to continue the program, then a preliminary injunction cannot be sustained even if HUD's actions warrant a finding of contempt.[5]

2.

With these considerations in mind, we turn now to the issue whether the plaintiffs have any likelihood of prevailing on the merits of their claim that HUD must continue the mortgage assignment program in accordance with the Amended Stipulation. We therefore must first determine whether Congress, in enacting the Downpayment Act, withdrew HUD's statutory authority to operate the assignment program.

Various provisions of the Downpayment Act manifest Congress' intent to terminate the mortgage assignment program required by the Amended Stipulation. Section 407(b) of the Downpayment Act amended Section 230 of the National Housing Act (12 U.S.C. § 1715u), which had previously provided the authority for HUD's operation of the mortgage assignment program. Although the

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[5] We note that the merits of HUD's motion to vacate its obligation under the Amended Stipulation are the same as the merits of the plaintiffs' motion to require HUD to continue the mortgage assignment program; the two motions are opposite sides of the same coin.

new Section 230 permits mortgage assignments under certain limited circumstances, *see* 12 U.S.C. § 1715u(c), Congress made clear in other provisions of the amended Section 230 that it wanted HUD to terminate the mortgage assignment program previously operated pursuant to the Amended Stipulation and under the authority of the former Section 230. Specifically, the amended Section 230 provides that no law shall be construed to require the Secretary to provide an alternative to foreclosure or to accept mortgage assignments. *See id.* § 1715u(f). Section 230 also precludes judicial review of any decision by the Secretary to exercise or forgo exercising any authority under the section. *See id.* § 1715u(d). Moreover, the amended provisions require mortgagees to take certain foreclosure avoidance and loss mitigation actions but expressly exclude from those required actions the assignment of mortgages to the Secretary. *See id.* § 1715u(a).

Additionally, Section 407(a) of the Downpayment Act amended Section 204(a) of the National Housing Act (12 U.S.C. § 1710(a)) to authorize HUD to pay insurance benefits to mortgagees who take foreclosure avoidance actions but excluded from such recompensable actions the assignment of mortgages to the Secretary.

We read these provisions of the Downpayment Act as expressing Congress' intent to remove the previous statutory authority for operation of the mortgage assignment program and to establish a new approach to assisting mortgagors in default. Indeed, the district court acknowledged that Section 204(a) of the National Housing Act (12 U.S.C. § 1710(a)), as amended by Section 407(a) of the Downpayment Act, no longer authorizes the operation of the mortgage assignment program. *See Ferrell*, 1998 WL 160916, at *4.

3.

We turn now to the plaintiffs' contention, and the district court's holding, that other statutory provisions left intact by the Downpayment Act provide sufficient statutory authority for the continued operation of the mortgage assignment program. We are unpersuaded that the general authority conferred by 42 U.S.C. § 1441 and 42 U.S.C. § 3535 is sufficient to support HUD's continued operation of the assignment program. Those provisions, in very general terms, direct HUD to exercise its powers consistently with national housing policy and authorize HUD to make such rules and regulations as are necessary to carry out its duties. We believe that a far more reasonable interpretation of the stautory scheme is to conclude that Congress expected the more particular provision to govern the more general. Indeed, to conclude that Congress, in withdrawing the specific statutory authority for the assignment program by amending Section 230 of the National Housing Act, still intended that HUD retain the authority to operate the program under these other general provisions would impute to Congress —undeservedly—uncertainty and confusion in articulating national housing policy that the statutory text, fairly read, simply does not convey.

The plaintiffs next submit, and the district court found, that, even if the Downpayment Act removed HUD's statutory authority to operate the assignment program, HUD still retains authority to operate an "equivalent substitute" in the form of a mandatory partial claim program under § 407(b) of the Downpayment Act (12 U.S.C. § 1715u(a), which is now codified at 12 U.S.C. § 1715u (b) (Supp. 1999)). We cannot accept this argument. Section 1715u(b) of Title 12 states that the "Secretary *may* establish a program for payment of a partial claim

to a mortgagee *that agrees* to apply the claim amount to payment of a mortgage. . . . *Id.* (emphasis added). This statutory language does not support the plaintiffs' argument that HUD is empowered to structure a partial claim program as a mandatory program. The district court and all parties seem to agree that the authority granted to HUD under this subsection is permissive, not mandatory, in nature. From HUD's perspective, the section permits—but does not require—the Secretary to administer such a program.[6] Secondly, from the perspective of the mortgagee, such a program hardly would be mandatory. The Secretary must supply sufficient economic incentive to make acceptance of the partial payment advantageous to the mortgagee. In short, the authority, and the obligations, of the Secretary under the newly enacted provisions are not the same as those under the earlier statutory scheme that the Amended Stipulation was intended to enforce.

4.

We conclude that Congress' enactment of the Downpayment Act has rendered HUD's continued operation of the mortgage assignment program statutorily unauthorized.[7] This court has recognized the principle that a

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[6] In the district court's view, this authority permits HUD to structure a mandatory program "which would provide relief as equivalent *as possible* to the assignment program, in fulfillment of HUD's obligation under the Amended Stipulation." *Ferrell*, 1998 WL 160916, at *5 (emphasis added). As even the district court's own language necessarily admits, the new legislation does not mandate the establishment of a program that would comply with the Amended Stipulation.

[7] Our conclusion is confirmed by Congress' recent enactment of the Appropriations Act, which contains a provision specifically addressing the fate of the mortgage assignment program. In 12 U.S.C. § 1710(a)(9) (Supp. 1999), Congress made specific reference to the Downpayment Act's withdrawal of authority for the

change in the law can require modification of a consent decree. *See David B. v. McDonald*, 116 F.3d 1146, 1149-50 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 692 (1998); *Ferrell*, 743 F.2d at 464 (citing *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961)). Indeed, the Supreme Court has held that "[a] consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992). In this case, the amendments to the National Housing Act constituted a change in the law that has made HUD's continued compliance with the Amended Stipulation an impossibility. We therefore hold that there is no likelihood of the plaintiffs' prevailing on the merits of their motion to require HUD to reinstate the assignment pro-

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mortgage assignment program and made clear its intent that HUD no longer operate the assignment program previously required by the Amended Stipulation. Although the newly amended Section 204(a)(1)(A) of the National Housing Act (12 U.S.C. § 1710(a)(1)(A)) permits the Secretary to accept mortgage assignments under certain circumstances, § 1710(a(9) clarifies that such assignments are not part of the old mortgage assignment program or any equivalent program. We understand this provision to voice Congress' intent that no law or order, nor the Amended Stipulation, does anything to bring back the mortgage assignment program (or an equivalent substitute) that was terminated by the Downpayment Act.

Moreover, the Appropriations Act's amendments to Section 204 (a)(2) of the National Housing Act (12 U.S.C. § 1710(a)(2)) contradict the plaintiffs' argument that HUD retains authority to operate an "equivalent substitute" for the assignment program in the form of a mandatory partial claim program. 12 U.S.C. § 1710 (a)(2) provides that the Secretary may pay insurance benefits to mortgagees in recompense for various loss mitigation actions taken to provide an alternative to foreclosure. Importantly, the provision explicitly states that no action or failure to act by either the Secretary or a mortgagee under that paragraph shall be subject to judicial review.

gram. Because we hold that the plaintiffs have no likelihood of success on the merits, we need not review the district court's findings regarding irreparable harm or the absence of an adequate remedy at law in order to conclude that the issuance of the preliminary injunction was erroneous. The district court's grant of a preliminary injunction must be reversed.

5.

HUD's delay of almost eight months after Congress passed the Downpayment Act before petitioning the district court for modification of the Amended Stipulation gives us pause. However, HUD's delay in seeking modification of the consent decree cannot justify a preliminary injunction requiring HUD to do something that it no longer has the statutory authority to do. *See System Federation No. 91*, 364 U.S. at 651; *Ferrell*, 743 F.2d at 464. Nor, under the circumstances presented here, does it warrant the imposition of a contempt citation against HUD. *See Collins v. Barry*, 841 F.2d 1297, 1300 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988). The purposes of a civil contempt order are to "coerce compliance with the underlying order and/or to compensate the complainant for loss sustained by disobedience." *Blocksom & Co. v. Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978). When the underlying order is erroneously issued or is no longer valid, a civil contempt order would serve neither of those purposes. *See id.*; *see also Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 746 (7th Cir. 1976); *Lewis v. S.S. Baune*, 534 F.2d 1115, 1119 (5th Cir. 1976). Moreover, the plaintiffs' contempt motion was part and parcel of its effort to enforce the Amended Stipulation and to receive compensation for HUD's termination of the assignment program. Now that we have resolved in HUD's favor the question of HUD's

obligation to continue the assignment program under the Amended Stipulation, a contempt order would not be appropriate.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings.

REVERSED and REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 334
JUDGE DAVID H. COAR

JAMES and JOYCE FERRELL, *et al.*,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

Currently before this court is a renewed motion by the plaintiffs to require the United States Department of Housing and Urban Development (hereinafter "HUD" or "defendants") to reinstate a mortgage assignment program. For the reasons stated in this memorandum opinion and order, this court grants the plaintiffs a preliminary injunction requiring HUD to reinstate the program until such time as this court rules on the underlying motions.

I. BACKGROUND

As the relevant facts in this case are detailed in this court's earlier memorandum opinion and order, it is only necessary to review them briefly here. *See Ferrell v. U.S. Dept. of Housing and Urban Development et al.*, 1996

WL 680245, at *1 (N.D. Ill. Nov. 21, 1996). In 1973, the plaintiffs filed a nationwide class action on behalf of a class of low- and moderate-income individuals who sought mortgage foreclosure relief from the United States Department of Housing and Urban Development ("HUD"). Plaintiffs alleged that HUD had violated the National Housing Act, 12 U.S.C. §§ 1709, 1715z ("Housing Act"), by failing to provide foreclosure avoidance assistance to the plaintiffs. In *Brown v. Lynn,* 385 F. Supp. 986 (N.D. Ill. 1974), it was determined that the Housing Act obligated HUD to provide mortgage foreclosure avoidance assistance to mortgagors in default. *See id.* at 998-99.

On July 29, 1976, HUD entered into a consent decree agreeing to implement a program to accept assignments of insured mortgages in default (the "assignment program" in order to provide foreclosure assistance to homeowners experiencing temporary financial distress. *See Ferrell v. Pierce,* 560 F. Supp. 1344, 1348 (N.D. Ill. 1983), *aff'd,* 743 F.2d 454 (7th Cir. 1984). In August 1979, the parties agreed to an Amended Stipulation, which was approved by the federal court in November 1979. Although HUD's specific duties under the Amended Stipulation terminated in 1984, paragraph 14 of the Stipulation sets forth the following continuing requirement:

> The termination of the Department's specific obligations under this Amended Stipulation shall not diminish or compromise the Department's obligation construed under the National Housing Act as amended, and Section 2 of the Housing and Urban Development Act of 1968 to provide foreclosure avoidance relief for mortgagors in temporary financial distress, and the Department shall provide assistance or relief in the form of the present assignment program or an

> equivalent substitute to permit mortgagors in default on their mortgages to avoid foreclosure and to retain their homes during periods of temporary financial distress.

(Am. Stip. ¶ 14.)

According to the plaintiffs, since April 26, 1996, the defendants have refused to accept applications under the mortgage assignment program approved in the Amended Stipulation. (Am. Contempt Mot. ¶ 1.) Not until September 27, 1996 did the defendants file a motion to vacate the Amended Stipulation. On October 2, 1996, the plaintiffs filed a motion to hold the defendants in civil contempt for failing to comply with the Amended Stipulation and court order. Among other things, the plaintiffs requested an order directing HUD to reinstate the assignment program.

An initial hearing on the parties' motions was held on October 8, 1996. The plaintiffs requested that briefing proceed in stages, with the first issue to be briefed being whether HUD should be ordered to reinstate the mortgage assignment program referred to in the Amended Stipulation pending a full and complete resolution of the underlying motions. As the resolution of the defendants' motion to vacate could involve a lengthy court process, this court agreed to the plaintiffs' proposed briefing schedule. This court ordered the parties to brief the issue of whether, pursuant to the Amended Stipulation, HUD should be ordered to reinstate the mortgage assignment program or an equivalent substitute.

In this court's memorandum opinion and order of November 21, 1996, the plaintiffs' motion to require reinstatement of the mortgage assignment program was addressed. *See Ferrell*, 1996 WL 680245 at *1. Finding that the plaintiffs had not presented any evidence of ir-

reparable harm as would be required to grant a preliminary injunction, this court denied the plaintiffs' motion. *Id.* at *5. Subsequently, the plaintiffs filed a renewed motion to require HUD to reinstate the assignment program in which they included evidence of the alleged harm suffered by HUD's refusal to continue the program. It is that motion that is currently before the court.

II. DISCUSSION

A. Does HUD have the statutory authority to implement the assignment program, or an equivalent program?

According to the plaintiffs, the defendants have failed to process applications for assignment of mortgage since April 26, 1996. (Am. Contempt Mot. ¶ 2.) The plaintiffs further allege that, since April, 1996, the defendants have continued to refuse to implement a mandatory foreclosure-avoidance relief program consistent with its obligations under this court's order and the Amended Stipulation. (Am. Contempt Mot. ¶ 5.) Paragraph 14 of the Amended Stipulation requires HUD to operate the mortgage assignment program or "an equivalent substitute to permit mortgagors in default on their mortgages to avoid foreclosure and to retain their homes during periods of temporary financial distress." (Am. Stip. ¶ 14.) The plaintiffs point out that, not only have the defendants refused to accept assignment of mortgages, but also they have issued "an interim regulation that establishes a non-mandatory partial claim procedure that is not as equivalent as possible to the mortgage assignment program." (Am. Contempt Mot. ¶ 24.) The plaintiffs claim that the defendants have also refused to operate an equivalent substitute, (Am. Contempt Mot. ¶ 24), such as "a mandatory partial claim program, administered pursuant to HUD's authority under § 407(b) of the Downpayment Act," (Pls.' Reply at 16).

In a hearing held on December 6, 1996, this court ordered the parties to brief the plaintiffs' renewed motion to reinstate the assignment program. In particular, the defendants were requested to indicate in their briefs why they contend that there is no equivalent program to the assignment program.

In their brief, however, the defendants do not address the question of whether there is an equivalent program to the assignment program. Instead, they present two arguments on why they cannot or will not implement such a program. First, the defendants explain that they believe other programs are superior to the assignment program: "If any program is universally mandatory, homeowners lose the opportunity to employ the foreclosure avoidance mechanism most suited to their individual circumstances." (Defs.' Opp. Mot. at 5.) They also provide the court with statistics that allegedly demonstrate that the program is ineffective. For example, they state that "only about 30 percent of the defaulted loans assigned to HUD 'come out whole.' " (Defs.' Opp. Mot. at 4.) In response, the plaintiffs make two arguments: first, that the defendants cannot unilaterally rescind the court's order, even if they believe it is not efficacious, and second, that the issue is not which program is most effective, but rather whether the current program is "equivalent" to the assignment program.

The defendants' second argument addresses why they believe they cannot implement the assignment program and is more worthy of discussion here. Specifically, the defendants argue that they are unable to comply with the Amended Stipulation as a result of a new law, the Balanced Budget Downpayment Act (hereinafter "Downpayment Act"), Pub. L. 104-99, 110 Stat. 26. HUD contends that § 407(a) of the Downpayment Act forbids it

from operating the mortgage assignment program and expressly prohibits judicial review of the decisions of the Secretary. (Defs.' Opp. Mot. at 2.) Although the Act does allow HUD to establish "a program for payment of a partial claim," it also states that payments under such a program "shall be made in the sole discretion of the Secretary" and "[n]o decision by the Secretary . . . shall be subject to judicial review." (Defs. Opp. Mot. at 11.) (citing Downpayment Act, § 407(b).) Furthermore, § 407(b) of the Downpayment Act expressly states that: "[n]o provision of the [National Housing] Act, or any other law, shall be construed to require the Secretary to provide an alternative to foreclosure."

The plaintiffs respond that HUD does retain the statutory authority to operate a mortgage assignment program, or an equivalent substitute of the assignment program, as required by the Amended Stipulation. First, the plaintiffs attack the defendants' interpretation of § 407(a) as forbidding implementation of the assignment program. Section 407(a) of the Downpayment Act provides in the relevant part that:

> [T]he Secretary may provide an alternative to the foreclosure of a mortgage that is in default . . . but which *may not include assignment of a mortgage to the Secretary*: And provided further, That for purposes of the preceding proviso, no action authorized by the Secretary and no action taken, nor any failure to act, by the Secretary or the mortgagee shall be subject to judicial review.

(amending 12 U.S.C. § 1710(a)) (emphasis added). Although § 407(a) clearly contains prohibitory language, the plaintiffs argue that the defendants' reading of the section to be a "blanket statutory prohibition against the payment of insurance benefits to secure assignments of mortgages . . . ignores other congressional directives and

lifts the provision out of its statutory context." (Pls.' Oct. 29, 1996 Mem. at 15.) As the Seventh Circuit stated in an earlier decision in the long line of decisions involving these plaintiffs, HUD's "authority to offer mortgage insurance to individuals purchasing homes" exists in "various provisions of the National Housing Act." *Ferrell*, 743 F.2d at 455.

One of the statutory sections highlighted by the plaintiffs is 42 U.S.C. § 1441, which provides that one of the goals of national housing policy is to assist in "the goal of a decent home and a suitable living environment for every American family." 42 U.S.C. § 1441 further provides that the National Housing Act imposes the following obligations on HUD:

> The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such a manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist (1) the production of housing of sound standards of design, construction, livability, and size for adequate family life; (2) the reduction of the costs of housing without sacrifice of such sound standards; (3) the use of new designs (etc.) and the increase of efficiency on residential construction and maintenance; (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities; and (5) the stabilization of the housing industry at a high annual volume of residential construction.

In *Brown*, 385 F. Supp. at 998-99, the court interpreted 42 U.S.C. § 1441 as providing HUD with the authorization for operating a mandatory foreclosuree avoidance relief program.

The plaintiffs also point to 42 U.S.C. § 3535(d), which provides HUD with general rule making authority to "make such rules and regulations as may be necessary to carry out [the Secretary's] functions, powers and duties." In addition, 42 U.S.C. § 3535(i)(3) "expressly authorize[s]" the Secretary to "sell or exchange any securities or obligations upon such terms as he may fix." Also, 42 U.S.C. § 3535(i)(5) authorizes HUD to "consent to the modification, with respect to the rate of interest, time of payment of any installment of principal or interest, security, or any other term of any contract or agreement to which he is a party or which has been transferred to him." The provisions in 42 U.S.C. § 3535 authorize HUD in all cases, except when "such authority is otherwise expressly provided in any other Act administered by the Secretary." 42 U.S.C. § 3535. As the express statutory authority for the program was removed by § 407(a) of the Downpayment Act, the plaintiffs argue that 42 U.S.C. § 3535, read together with 42 U.S.C. § 1441, confer upon HUD the authority to operate an assignment program. Thus, although 12 U.S.C. § 1710(a) as amended by § 407(a) of the Downpayment Act, no longer authorizes the Secretary to implement a mortgage assignment program, HUD retains authority under other programs to continue administration of such a program.

Next, the plaintiffs contend that, even if it were determined that the Downpayment Act did eliminate the statutory authority to operate an assignment program, the defendants' obligation to operate a mandatory foreclosure-avoidance program remains and HUD has the statutory

authority to operate an "equivalent" program in the form of a manadtory partial-claim program. In arguing that statutory authority for an equivalent program exists, the plaintiffs point to § 407(b) of the Downpayment Act which states that "[t]he Secretary may establish a program for payment of a partial claim to a mortgagee that agrees to apply the claim amount to payment of a mortgage on a 1- to 4-family residence that is in default." Downpayment Act, § 407(b) (amending 12 U.S.C. § 1715(u)). The plaintiffs explain that the language of the amendment is permissive (e.g., "may establish"): therefore, the statute permits, but does not require, HUD to operate a partial claim program. The only restrictions placed on the Secretary's discretion in establishing such a program are the following:

> (1) the amount ofthe payment shall be in an amount determined by the Secretary, not to exceed an amount equivalent to 12 of the monthly mortgage payments and any costs related to the default that are approved by the Secretary; and (2) the mortgagor shall agree to repay the amount of the insurance claim to the Secretary upon terms and conditions acceptable to the Secretary.

Downpayment Act, § 407(b).

This court is persuaded by the plaintiffs' analysis of the law. Although statutory authority to operate the assignment program is no longer found in 12 U.S.C. § 1710(a), such authority may be found in other statutory provisions. Furthermore, this court finds that HUD also has the statutory authority to operate an equivalent substitute. Specifically, HUD may operate the partial claim program, which could be structured as a mandatory program which would provide relief as equivalent as possible to the assignment program, in fulfillment of HUD's obligation under the Amended Stipulation.

B. Can This Court Order the Defendants to Comply with Amended Stipulation?

A second preliminary issue is whether this court may order the defendants to fulfill their obligations under the Amended Stipulation. The defendants argue that any order by this court to fulfill their obligations under the Amended Stipulation would be in violation of the Downpayment Act. Specifically, the defendants point to § 407(a) of the Downpayment Act, which provides that "[n]o decision by the Secretary . . . shall be subject to judicial review." Similarly, § 407(b) states that "[n]o provision of this chapter . . . shall be construed to require the Secretary to provide an alternative to foreclosure."

Despite such language, however, the Downpayment Act has not altered HUD's obligation to seek modification of the Amended Stipulation before terminating the assignment program. Indeed, the obligation of HUD to operate an assignment program or an equivalent program existed prior to Congress' directive to free HUD from judicial review. It is well-established that court orders remain effective until they are modified by the court: "Indeed, so powerful is the notion that litigants must observe the regularized form of judicial proceedings by moving to vacate even a void court order, rather than engaging in self-help by ignoring it, that such obligation prevails even where the litigant's conduct involves the exercise of First Amendment rights." *S.E.C. v. Kimmes*, 753 F. Supp. 695, 700 (N.D. Ill. 1990) (citing *Walker v. City of Birmingham*, 388 U.S. 307, 87 S. Ct. 1824 (1967)) *See also Matter of Krynicki*, 983 F.2d 74, 78 (7th Cir. 1992) ("[T]he collateral bar doctrine requires litigants to obey invalid orders while they are outstanding.") (citing *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439-40, 96 S. Ct. 2697, 2706 (1976)); *U.S. v.*

Seale, 461 F.2d 345, 361 (7th Cir. 1972) ("It is well settled that the invalidity of a court order is not generally a defense in a criminal contempt proceeding alleging its disobedience.") (citing *Walker*, 388 U.S. 307, 87 S. Ct. 1824).

C. Preliminary Injunction

As this court expressed in its earlier opinion, the decision of whether the assignment program, or an equivalent substitute, should be reinstated pending a hearing should be analyzed in a way similar to a request for a preliminary injunction. *Ferrell*, 1996 WL 680245 at *5. This court's reasoning in employing such a standard is to prevent any potential for harm to the plaintiffs pending the resolution of this matter, which could be considerably delayed.

1. Legal Standard

In order to obtain a preliminary injunction, the moving party must demonstrate (1) some likelihood that it will prevail on the merits of its claim; (2) absence of an adequate remedy at law; and, (3) that it will suffer irreparable harm absent injunctive relief. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1067 (7th Cir. 1994); *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 613 (7th Cir.), *cert. denied*, 459 U.S. 880, 103 S.Ct. 176 (1982). "The greater the harm to the plaintiff if the injunction is denied, the less of a showing that his case has merit need he make to get the injunction; the less the harm, the stronger the required showing of merit. And conversely for the defendant: the greater the harm to him if the injunction is granted, the less of a case on the merits need he make to defeat the plaintiff's motion." *Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1392 (7th Cir. 1992)

(citing *American Hosp. Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 593-94 (7th Cir. 1986)); *Kowalski v. Chicago Tribune Co.*, 854 F.2d 168, 170 (7th Cir. 1988); *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1371-72 (7th Cir. 1989)). The harm that is relevant for the purposes of a preliminary injunction "are the irreparable ones, because a harm that will be cured by the entry of the final judgment supplies no reason for interim relief." *Id.*

2. Plaintiffs' delay in filing for emergency relief

The defendants' first argument against granting the plaintiffs a preliminary injunction is that the plaintiffs' delay in moving for emergency relief "provides an independent basis for denying their motion." (Defs.' Opp. Mot. at 8.) The legislation in dispute in this case, the Downpayment Act, took effect on April 26, 1996. According to the defendants, the plaintiffs delayed almost six months—until October 5, 1996—before requesting emergency relief. (Defs.' Opp. Mem. at 9.) This court, however, is not persuaded that this delay of over five months is significant enough to require a denial of the plaintiffs' claims. The delay is particularly understandable as a result of the fact that plaintiffs' counsel, who worked at a federally funded legal services program, was prohibited from filing any new claim in a pending class action as of April 26, 1996. *See* Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-29 (April 26, 1996). Subsequently, plaintiffs' counsel resigned from the federally funded legal service program and filed a motion to substitute counsel, which was not granted until July 9, 1996. (Pls.' Mot. at 6-7.) This court finds that the plaintiffs' counsel acted as expeditiously as possible under the circumstances and therefore rejects the defendants' argument that such delay bars the plaintiffs' claims.

3. Likelihood of Harm

The plaintiffs claim that, as a result of the defendants' termination of the assignment program, "thousands of plaintiff class members who would have received relief and avoided foreclosure under the mortgage assignment program are now having their mortgages foreclosed and are losing their homes." (Pls.' Am. Contempt Mot. ¶ 27.) The plaintiffs present affidavits and declarations from seven housing counselors and attorneys, which attest to the harm being suffered by the plaintiff class. In these declarations, the housing counselors and attorneys explain that members of the plaintiff class are losing their homes as a result of the termination of the assignment program. Furthermore, according to these declarations, few members of the class have received relief under HUD's "alternative forms of foreclosure avoidance." (Ex. A ¶ 20.)

The defendants do not present any evidence contradicting the plaintiffs' showing of harm. Instead, the defendants argue that the plaintiffs' affidavits are inadmissible hearsay evidence and inadmissible under Federal Rules of Evidence 801(c), 802, and 101. The defendants seem to argue that because "[n]one of the affidavits or declarations were executed by class members," (Def.' Opp. Mot. at 8), the declarants do not have personal knowledge of the facts to which they attest. However, such an argument misconstrues Fed.R.Evid. 801(c) and the testimony included in the declarations. Contrary to the defendants' contentions, the declarants do have direct knowledge of the facts included in their statements. For example, the declarants discuss their experiences in assisting homeowners in foreclosure proceedings, their contacts with HUD after the termination of the assignment program, and the effects that the termination of the assignment program have had on the clients that they represent.

This court finds that the plaintiffs have presented compelling evidence that the members of the plaintiff class

will suffer irreparable injury if the injunction is denied. Furthermore, there is no adequate remedy at law for the loss of one's home as a result of the denial of foreclosure assistance.

4. Likelihood of Success on the Merits

The defendants next argue that the plaintiffs are unable to show that they are likely to succeed on the merits of their claim. In deciding whether the plaintiffs are likely to prevail, the relevant legal question is whether the plaintiffs are likely to prevail on their contempt motion. Under the "sliding scale" approach applied in this circuit to preliminary injunctions, "[t]he greater the harm to the plaintiff if the injunction is denied, the less of a showing that his case has merit need he make to get the injunction." (*Diginet Inc.*, 958 F.2d at 1393. This court has found that the harm the plaintiffs will suffer if relief is denied is great. Therefore, the burden of proof regarding whether or not the plaintiffs will prevail on the underlying motion is relatively less.

As this court has already discussed, court orders remain effective until they are modified by the court. It is undisputed that the defendants did not seek to vacate the court's order prior to discontinuing the assignment program. The defendants concede in their brief that "HUD acknowledges that it failed to move promptly for to vacate the decree upon enactment of the legislation that eliminated the mortgage assignment program." (Defs.' Opp. Mot. at 1, n. 2.) As this court previously stated "HUD's actions suggest repudiation of an assurance made to this court in 1983 and a contumacious disregard of this court's orders." *Ferrell*, 1996 WL 680245 at *4. Given the law on the issue of contempt and the defendants' blatant disregard of the court's order without seeking

prior vacation of the order, it is likely that the plaintiffs will prevail on the issue of contempt.

III. CONCLUSION

WHEREFORE, the plaintiffs' motion for a preliminary injunction to require HUD to reinstate an assignment program [551-1] is GRANTED. Pursuant to the Amended Stipulation, the defendants are ordered to reinstate either the assignment or an "equivalent" substitute, in the form of a mandatory partial claim program, until further order from this court. Furthermore, the plaintiffs' motions for sanctions to effect compliance [541-1] and to afford compensatory relief [541-2] are denied without prejudice as duplicative of the motion for a preliminary injunction discussed in this memorandum opinion and order.

Enter:

/s/ David H. Coar
DAVID H. COAR
United States District Judge

Dated: March 30, 1998

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October 13, 1999

Before

HON. RICHARD A. POSNER, Chief Judge

HON. RICHARD D. CUDAHY, Circuit Judge

HON. KENNETH F. RIPPLE, Circuit Judge

No. 98-2361

JAMES D. FERRELL, JOYCE A. FERRELL, and JOHNNIE D. BROWN, *et al.*, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and ANDREW CUOMO, Secretary, United States Department of Housing and Urban Development,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 73 C 334—*David H. Coar*, Judge

ORDER

Upon consideration of the petition for rehearing en banc filed by Plaintiffs-Appellees on September 9, 1999,

no judge in active service has requested a vote thereon, and all judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

APPENDIX D

STATUTORY PROVISIONS

TITLE 12. BANKS AND BANKING
CHAPTER 13. NATIONAL HOUSING
MORTGAGE INSURANCE

12 USCS § 1715u (1999)

§ 1715u. Authority to assist mortgagors in default

(a) Loss mitigation. Upon default of any mortgage insured under this title, mortgagees shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure (including but not limited to actions such as special forbearance, loss modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under section 204(a)(1)(A) [12 USCS § 1710(a)(1)(A)]) as provided in regulations by the Secretary.

(b) Payment of partial claim. The Secretary may establish a program for payment of a partial claim to a mortgagee that agrees to apply the claim amount to payment of a mortgage on a 1- to 4-family residence that is in default. Any such payment under such program to the mortgagee shall be made in the sole discretion of the Secretary and on terms and conditions acceptable to the Secretary, except that—

(1) the amount of the payment shall be in an amount determined by the Secretary, not to exceed an amount equivalent to 12 of the monthly mortgage payments and any costs related to the default that are approved by the Secretary; and

(2) the mortgagor shall agree to repay the amount of the insurance claim to the Secretary upon terms and conditions acceptable to the Secretary.

The Secretary may pay the mortgagee, from the appropriate insurance fund, in connection with any activities that the mortgagee is required to undertake concerning repayment by the mortgagor of the amount owed to the Secretary.

(c) Assignment.

(1) Program authority. The Secretary may establish a program for assignment to the Secretary, upon request of the mortgagee, of a mortgage on a 1- to 4-family residence insured under this Act.

(2) Program requirements. The Secretary may accept assignment of a mortgage under a program under this subsection only if—

(A) the mortgage was in default;

(B) the mortgagee has modified the mortgage to cure the default and provide for mortgage payments within the reasonable ability of the mortgagor to pay, at interest rates not exceeding current market interest rates; and

(C) the Secretary arranges for servicing of the assigned mortgage by a mortgagee (which may include the assigning mortgagee) through procedures that the Secretary has determined to be in the best interests of the appropriate insurance fund.

(3) Payment of insurance benefits. Upon accepting assignment of a mortgage under a program established under this subsection, the Secretary may pay insurance benefits to the mortgagee from the appropriate insurance fund, in an amount that the Secretary determines to be appropriate, not to exceed the amount necessary to compensate the mortgagee for

the assignment and any losses and expenses resulting from the mortgage modification.

(d) Prohibition of judicial review. No decision by the Secretary to exercise or forego exercising any authority under this section shall be subject to judicial review.

(e) [Repealed]

(f) Applicability of other laws. No provision of this Act, or any other law, shall be construed to require the Secretary to provide an alternative to foreclosure for mortgagees with mortgages on 1- to 4-family residences insured by the Secretary under this Act, or to accept assignments of such mortgages.

Balanced Budget Downpayment Act. Pub. L. No. 104-99, 110 Stat. 26 (January 26, 1996)

EXTENSION OF HOME EQUITY CONVERSION MORTGAGE PROGRAM

SEC. 406. Section 255(g) of the National Housing Act (12 U.S.C. 1715z-20(g)) is amended—

(1) in the first sentence, by striking "September 30, 1995" and inserting "September 30, 1996"; and

(2) in the second sentence, by striking "25,000" and inserting "30,000".

FHA SINGLE-FAMILY ASSIGNMENT PROGRAM REFORM

SEC. 407. (a) FORECLOSURE AVOIDANCE.—Except as provided in subsection (e), the last sentence of section 204(a) of the National Housing Act (12 U.S.C. 1710(a)) is amended by inserting before the period the following: ": *And provided further,* That the Secretary may pay insurance benefits to the mortgagee to recompense the mortgagee for its actions to provide an alternative to the foreclosure of a mortgage that is in default, which actions may include special foreclosure, loan modification, and deeds in lieu of foreclosure, all upon terms and conditions as the mortgagee shall determine in the mortgagee's sole discretion, within guidelines provided by the Secretary, but which may not include assignment of a mortgage to the Secretary: *And provided further,* That for purposes of the preceding proviso, no action authorized by the Secretary and no action taken, nor any failure to act, by the Secretary or the mortgagee shall be subject to judicial review.".

(b) AUTHORITY TO ASSIST MORTGAGORS IN DEFAULT.—Except as provided in subsection (e), section 230 of

the National Housing Act (12 U.S.C. 1715u) is amended to read as follows:

"AUTHORITY TO ASSIST MORTGAGORS IN DEFAULT

"SEC. 230. (a) PAYMENT OF PARTIAL CLAIM.—The Secretary may establish a program for payment of a partial claim to a mortgagee that agrees to apply the claim amount to payment of a mortgage on a 1- to 4-family residence that is in default. Any such payment under such program to the mortgagee shall be made in the sole discretion of the Secretary and on terms and conditions acceptable to the Secretary, except that—

"(1) the amount of the payment shall be in an amount determined by the Secretary, not to exceed an amount equivalent to 12 of the monthly mortgage payments and any costs related to the default that are approved by the Secretary, and

"(2) the mortgagor shall agree to repay the amount of the insurance claim to the Secretary upon terms and conditions acceptable to the Secretary.

The Secretary may pay the mortgagee, from the appropriate insurance fund, in connection with any activities that the mortgagee is required to undertake concerning repayment by the mortgagor of the amount owed to the Secretary.

"(b) ASSIGNMENT.—

"(1) PROGRAM AUTHORITY.—The Secretary may establish a program for assignment to the Secretary, upon request of the mortgagee, of a mortgage on a 1- to 4-family residence insured under this Act.

"(2) PROGRAM REQUIREMENTS.—The Secretary may accept assignment of a mortgage under a program under this subsection only if—

"(A) the mortgage was in default;

"(B) the mortgagee has modified the mortgage to cure the default and provide for mortgage payments within the reasonable ability of the mortgagor to pay, at interest rates not exceeding current market interest rates; and

"(C) the Secretary arranges for servicing of the assigned mortgage by a mortgagee (which may include the assigning mortgagee) through procedures that the Secretary has determined to be in the best interests of the appropriate insurance fund.

"(3) PAYMENT OF INSURANCE BENEFITS.—Upon accepting assignment of a mortgage under a program established under this subseection, the Secretary may pay insurance benefits to the mortgagee from the appropriate insurance fund, in an amount that the Secretary determines to be appropriate, not to exceed the amount necessary to compensate the mortgagee for the assignment and any losses and expenses resulting from the mortgage modification.

"(c) PROHIBITION OF JUDICIAL REVIEW.—No decision by the Secretary to exercise or forego exercising any authority under this section shall be subject to judicial review.

"(d) SAVINGS PROVISION.—Any mortgage for which the mortgagor has applied to the Secretary, before the date of enactment of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1996, for assignment pur-

suant to subsection (b) of this section as in effect before such date of enactment shall continue to be governed by the provisions of this section, as in effect immediately before such date of enactment.

"(e) APPLICABDLITY OF OTHER LAWS.—No provision of this Act, or any other law, shall be construed to require the Secretary to provide an alternative to foreclosure for mortgagees with mortgages on 1- to 4-family residences insured by the Secretary under this Act, or to accept assignments of such mortgages."

(c) APPLICABILITY OF AMENDMENTS.—Except as provided in subseection (e), the amendments made by subsections (a) and (b) shall apply only with respect to mortgages insured under the National Housing Act that are originated before October 1, 1995.

(d) REGULATIONS.—Not later than 60 days after the date of enactment of this Act, the Secretary of Housing and Urban Development shall issue interim regulations to implement this section and the amendments made by this section.

(e) EFFECTIVENESS AND APPLICABILITY.—If this Act is enacted after the date of enactment of the Balanced Budget Act of 1995—

(1) subsections (a), (b), (c), and (d) of this section shall not take effect; and

(2) section 2052(c) of the Balanced Budget Act of 1995 is amended by striking "that are originated on or after October 1, 1995" and inserting in lieu thereof "that are originated before, during, and after fiscal year 1996.".

This Act may be cited as "The Balanced Budget Downpayment Act, I".

Approved January 26, 1996.

Appropriations Act for the Departments of Veterans Affairs and Housing and Urban Development, Pub. L. No. 105-276, 112 Stat. 2461 (October 21, 1998).

TITLE VI—FHA PROPERTY DISPOSITION REFORM

Sec. 601. Single Family Claims Reform and Sale of Property. (a) Revision of Claims Procedures.—Section 204 [**2671] of the National Housing Act (12 U.S.C. 1710) is amended by striking "Sec. 204." and all that follows through the end of subsection (a) and inserting the following:

204 "Sec. 204.(a) In General—

"(1)Authorized claims procedures.—The Secretary may, in accordance with this subsection and terms and conditions prescribed by the Secretary, pay insurance benefits to a mortgagee for any mortgage insured under section 203 through any of the following methods:

"(A) Assignment of mortgage.—The Secretary may pay insurance benefits whenever a mortgage has been in a monetary default for not less than 3 full monthly installments or whenever the mortgagee is entitled to foreclosure for a nonmonetary default. Insurance benefits shall be paid pursuant to this subparagraph only upon the assignment, transfer, and delivery to the Secretary of—

"(i) all rights and interests arising under the mortgage;

"(ii) all claims of the mortgagee against the mortgagor or others arising out of the mortgage transaction;

"(iii) title evidence satisfactory to the Secretary; and

"(iv) such records relating to the mortgage transaction as the Secretary may require.

"(B) Conveyance of title to property.—The Secretary may pay insurance benefits if the mortgagee has acquired title to the mortgaged property through foreclosure or has otherwise acquired such property from the mortgagor after a default upon—

"(i) the prompt conveyance to the Secretary of title to the property which meets the standards of the Secretary in force at the time the mortgage was insured and which is evidenced in the manner provided by such standards; and

"(ii) the assignment to the Secretary of all claims of the mortgagee against the mortgagor or others, arising out of mortgage transaction or foreclosure proceedings, except such claims as may have been released with the consent of the Secretary.

The Secretary may permit the mortgagee to tender to the Secretary as satisfactory conveyance of title and transfer of possession directly from the mortgagor or other appropriate grantor, and may pay to the mortgagee the insurance benefits to which it would otherwise be entitled if such conveyance had been made to the mortgagee and from the mortgagee to the Secretary.

"(C) Claim without conveyance of title.—The Secretary may pay insurance benefits upon sale of the mortgaged property at foreclosure where such sale is for at least the fair market value of the property (with appropriate adjustments), as determined

by the Secretary, and upon assignment to the Secretary of all claims referred to in clause (ii)of subparagraph (B).

"(D) Preforeclosure sale.—The Secretary may pay insurance benefits upon the sale of the mortgaged property by the mortgagor after default and the assignment to the [**2672] Secretary of all claims referred to in clause (ii)of subparagraph (B), if—

"(i) the sale of the mortgaged property has been approved by the Secretary;

"(ii) the mortgagee receives an amount at least equal to the fair market value of the property (with appropriate adjustments), as determined by the Secretary; and

"(iii) the mortgagor has received an appropriate disclosure, as determied by the Secretary.

(2) Payment for loss mitigation.—The Secretary may pay insurance benefits to the mortgagee to recompense the mortgagee for all or part of any costs of the mortgagee for taking loss mitigation actions that provide an alternative to foreclosure of a mortgage that is in default (including but not limited to actions such as special forbearance, loan modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under section 204(a)(1)(A)). No actions taken under this paragraph, nor any failure to act under this paragraph, by the Secretary or by a mortgagee shall be subject to judicial review.

"(3) Determination of claims procedure.—The Secretary shall publish guidelines for determining which of the procedures for payment of insurance under paragraph (1) are available to a mortgagee when it claims insurance benefits. At least one of the procedures for payment of

insurance benefits specified in paragraph (1)(A) or (1)(B) shall be available to a mortgagee with respect to a mortgage, but the same procedure shall not be required to be available for all of the mortgages held by a mortgagee.

"(4) Servicing of assigned mortgages.—If a mortgage is assigned to the Secretary under paragraph (1)(A), the Secretary may permit the assigning mortgagee or its servicer to continue to service the mortgage for reasonable compensation and on terms and conditions determined by the Secretary. Neither the Secretary nor any servicer of the mortgage shall be required to forbear from collection of amounts due under the mortgage or otherwise pursue loss mitigation measures.

"(5) Calculation of insurance benefits.—Insurance benefits shall be paid in accordance with section 520 and shall be equal to the original principal obligation of the mortgage (with such additions and deductions as the Secretary determines are appropriate) which was unpaid upon the date of—

"(A) assignment of the mortgage to the Secretary;

"(B) the institution of foreclosure proceedings;

"(C) the acquisition of the property after default other than by foreclosure; or

"(D) sale of the mortgaged property by the mortgagor.

"(6) Forbearance and recasting after default.—The mortgagee may, upon such terms and conditions as the Secretary may prescribe—

"(A) extend the time for the curing of the default and the time for commencing foreclosure proceedings

or for otherwise acquiring title to the mortgaged property, to such time as the mortgagee determines is necessary and desirable to enable the mortgagor to complete the mortgage payments, including an extension of time beyond the stated maturity of the mortgage, and in the event of a subsequent [**2673] foreclosure or acquisition of the property by other means the Secretary may include in the amount of insurance benefits an amount equal to any unpaid mortgage interest; or

"(B) provide for a modification of the terms of the mortgage for the purpose of recasting, over the remaining term of the mortgage or over such longer period pursuant to guidelines as may be prescribed by the Secretary, the total unpaid amount then due, with the modification to become effective currently or to become effective upon the termination of an agreed-upon extension of the period for curing the default; and the principal amount of the mortgage, as modified, shall be considered the 'original principal obligation of the mortgage' for purposes of paragraph (5).

"(7) Termination of premium obligation.—The obligation of the mortgagee to pay the premium charges for insurance shall cease upon fulfillment of the appropriate requirements under which the Secretary may pay insurance benefits, as described in paragraph (1). The Secretary may also terminate the mortgagee's obligation to pay mortgage insurance premiums upon receipt of an application filed by the mortgagee for insurance benefits under paragraph (1), or in the event the contract of insurance is terminated pursuant to section 229.

"(8) Effect on payment of insurance benefits under section 230.—Nothing in this section shall limit the au-

thority of the Secretary to pay insurance benefits under section 230.

"(9) Treatment of mortgage assignment program.—Notwithstanding any other provision of law, or the Amended Stipulation entered as a consent decree on November 8, 1979, in Ferrell v. Cuomo, No. 73 C 334 (N.D. Ill.), or any other order intended to require the Secretary to operate the program of mortgage assignment and forbearance that was operated by the Secretary pursuant to the Amended Stipulation and under the authority of section 230, prior to its amendment by section 407(b) of The Balanced Budget Downpayment Act, I (Public Law 104-99; 110 Stat. 45), no mortgage assigned under this section may be included in any mortgage foreclosure avoidance program that is the same or substantially equivalent to such a program of mortgage assignment and forbearance.".

(b) [12 USC 1710 note] Effective Date.—The Secretary shall publish a notice in the Federal Register stating the effective date of the terms and conditions prescribed by the Secretary under section 204(a)(1) of the National Housing Act, as amended by subsection (a) of this section. Subsections (a) and (k) of section 204 of the National Housing Act, as in effect immediately before such effective date, shall continue to apply to any mortgage insured under section 203 of the National Housing Act before such effective date, except that the Secretary may, at the request of the mortgagee, pay insurance benefits as provided in subparagraphs (A) and (D) of section 204 (a)(1) of such Act to calculate insurance benefits in accordance with section 204(a)(5) of such Act.

(c) Repeal of Redundant Provision.—Subsection (k) of secton 204 of the National Housing Act (12 U.S.C. 1710 (k)) is hereby repealed.

(d) Authority To Sell.—Section 204(g) of the National Housing Act (12 U.S.C. 1710(g)) is amended by adding at the end [**2674] the following new sentence: "The Secretary may sell real and personal property acquired by the Secretary pursuant to the provisions of this Act on such terms and conditions as the Secretary may prescribe."

(e) Authority To Insure Mortgage.—Section 223(c) of the National Housing Act (12 U.S.C. 1715n(c)) is amended—

(1) by striking "him" each place it appears and inserting "the Secretary"; and

(2) by inserting before "of any property acquired", the following: ", including a sale

through another entity acting under authority of the fourth sentence of section 204(g),".

(f) Loss Mitigation.—Section 230 of the National Housing Act [12 USC 1715u] is amended—

(1) by redesignating subsections (a) through (e) as (b) through (f); and

(2) by inserting a new subsection (a) as follows:

"(a) Upon default of any mortgage insured under this title, mortgagee shall engage in loss mitigation actions for the purpose of providing an alternative to foreclosure (including but not limited to actions such as special forbearance, loss modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under section 204(a)(1)(A)) as provided in regulations by the Secretary.".

(g) Penalty.—Section 536(a) of the National Housing Act [12 USC 1735f-14] is amended by inserting at the end of paragraph (2) the following:

"In the case of the mortgagee's failure to engage in loss mitigation activities, as provided in section 536(b)(1)(I), the penalty shall be in the amount of three times the amount of any insurance benefits claimed by the mortgagee with respect to any mortgage for which the mortgagee failed to engage in such loss mitigation actions.".

(h) Violation.—Section 536(b)(1) of the National Housing Act is amended by inserting after subparagraph (h) the following:

"(I) Failure to engage in loss mitigation actions as provided in section 230(a) of this Act.".

[*602] Sec. 602. Disposition of HUD-Owned Single Family Assets in Revitalization Areas.—Section 204 of the National Housing Act (12 U.S.C. 1710) is amended—

(1) by redesignating subsection (h) as subsection (i); and

(2) by inserting after subsection (g) the following new subsection:

"(h) Disposition of Assets in Revitalization Areas.—

"(1) In general.—The purpose of this subsection is to require the Secretary to carry out a program under which eligible assets (as such term is defined in paragraph (2)) shall be made available for sale in a manner that promotes the revitalization, through expanded homeownership opportunities, of revitalization areas. Notwithstanding the authority under the last sentence of subsection (g), the Secretary shall dispose of all eligible assets under the program and shall establish the program in accordance with the requirements under this subsection.

"(2) Eligible assets.—For purposes of this subsection, the term 'eligible asset' means any of the following assets of the Secretary:

"(A) Properties.—Any property that—

[**2675] "(i) is designed as a dwelling for occupancy by 1 to 4 families;

"(ii) is located in a revitalization area;

144 Cong. Rec. H9437 (daily ed. Oct. 5, 1998).

TITLE VI—SINGLE FAMILY PROPERTY DISPOSITION

Inserts language providing HUD with additional flexibility to choose the most cost-effective methods of paying insurance claims and disposing of acquired notes or homes under FHA single family programs. Specifically, the provision:

(1) reorganizes the current section 204(a) of the National Housing Act and eliminates obsolete or redundant provisions;

(2) provides a new claims payment procedure that permits HUD to pay a claim upon assignment of the mortgage rather than upon conveyance of the property;

(3) authorizes HUD to take assignment of the notes and transfer them to private parties for servicing, foreclosure avoidance, foreclosure, property management, and asset disposition; and,

(4) provides HUD with authority, similar to the FHA multifamily disposition program, that allows FHA to be an equity participant in private entities.

Additionally, the provision allows a structured financing for asset disposition in which FHA retains an equity interest, thereby increasing the value of the asset over simple asset sales. It eliminates the precise statutory formula for determining insurance benefits due a mortgagee by allowing HUD to adjust the additions and deductions prospectively through administrative action, to reflect new information, changing conditions, and state law requirements.

The conferees wish to impress upon HUD the importance of an aggressive and effective loss mitigation program. Such a program could keep families in their homes

longer and would, most certainly, decrease losses to the FHA insurance fund. Currently, HUD's mortgage servicers have no affirmative duty to undertake loss mitigation activities. Therefore, the conference agreement has included language requiring loss mitigation activities upon default of a mortgage. Failure by a mortgagee to engage in loss mitigation activities could result in a penalty of three times the amount of any insurance benefits claimed by the mortgagee. The conferees urge HUD, in conjunction with the lending community, to develop a comprehensive loss mitigation program and to propose to the Congress any statutory changes necessary to implement such a program.

Finally, the provision substitutes a requirement of disclosure of information regarding pre-foreclosure sales for the counseling currently required before use of pre-foreclosure sales and eliminates a requirement excluding the use of loss mitigation tools by enabling mortgagees to make better use of recasting and forbearance as part of loss mitigation. Inserts language requiring HUD to treat certain FHA single family assets in certain distressed neighborhoods differently than those in non-revitalization areas in order to make the areas sustainable and to diminish the number of properties sold to speculators. The provision is designed to stabilize the neighborhood by encouraging homeownership of good, decent, and structurally sound homes, and replaces the current 'right of first refusal' and discount system.

HUD is required, in conjunction with local stakeholders, to establish revitalization areas. These areas are determined on the basis of whether they have a high proportion of low income households, a high number of troubled assets, or a low rate of homeownership.

Additionally, the legislation provides for the establishment of smaller asset control areas within the larger

revitalization areas. In those targeted areas, HUD and local partners shall implement an agreement to increase the level of repair and the level of owner occupant purchasers in those specially targeted areas. To encourage these agreements, HUD is authorized to offer pricing discounts that are based on an appropriate appraisal. HUD is obligated to offer, and the local partners are obligated to take, all FHA single family assets that are or that become available in these areas.

Once the revitalization and asset control areas are determined, assets offered for sale must be repaired so purchasers are not saddled with high repair costs. The conferees believe that adequate rehabilitation and renovations must be made to these homes to make them attractive to buyers as well as to increase the stability of the neighborhood. Therefore, rehabilitation standards should include whether the homes are in good, safe and habitable condition, whether major systems are dependable and in good repair, and whether the properties are marketable to owner occupants given the standards and preferences of the local community. Though preferred purchasers may incorporate higher rehabilitation standards, non-preferred purchasers must meet at least minimum property standards, as determined by HUD.

The conferees believe that increasing homeownership in these areas is particularly important if they are to become sustainable. Therefore, assets (within the control of the purchasers) in these areas must be sold to owner occupants in a proportion that matches, if not exceeds, the proportion of owner occupants in the metropolitan area. Though HUD is given the authority, in certain circumstances, to waive this provision, any deviations are expected to be rare and merit consultation with local units of government and other involved parties. The conferees do not intend for HUD to waive the homeownership re-

quirement for solely economic consideration. Downward deviations should be only for the purpose of strengthening the revitalization of the areas in which they may occur.

The conferees direct HUD to report to Congress annually on the number and characteristics of areas designated, or rejected, as revitalization and asset control areas. The report should include the number of eligible assets within each area and the basis for any rejection of designation.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

---

73 C 334

JAMES AND JOYCE FERRELL,
Plaintiffs.

VS

MOON LANDRIDU, *et al.*,
Defendants.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable HUBERT L. WILL, Senior Judge of said Court, in his courtroom in teh United States District Courthouse, Chicago, Illinois, on March 5, 1980, at the hour of 10:00 o'clock, a.m.

* * * *

[9] THE COURT: Now the question is how much time do we want for return on the rule?

MS. NELSON: Your Honor, I would like to say that we do consider this to be a threshold issue on whether the order to [10] show cause should issue because it is the Executive's Constitutional mandate and function to propose legislation.

THE COURT: To frustrate court decrees? Ms. Nelson, you are going to get nowhere as I am sure Ms. McGrew will tell you, telling me you have the right to agree to a decree, a consent decree in this court, I didn't

order this, this is not you going to Congress to reverse some judge's decision, or even a Supreme Court decision with which you disagree. This is a consent decree to which you agreed and if you are double dealing with me, agreeing in this court to one thing and going to Congress to get something else, you aren't going to find any court in the land that is going to back up your Constitutional right of executive power to reverse a court on a consent decree.

You find me a case which says that the executive has the power to go to the legislature to get out from under something they have agreed to.

I think you will find no such case.

MS. NELSON: That is not our position, your Honor.

THE COURT: That is what your position was, in fact, in this case. This is a consent decree. This is not a decree which I ordered over your objections. This is not a decision which I made over your opposition.

This is a consent degree to resolve a controversy which I thought had been resolved four years ago by the [11] stipulated settlement, and which I discovered was, in fact, not being in good faith carried out by HUD, and which I was distressed to discover, and I said at the time if I had known that I would have issued a rule to show cause a long time ago—you were here when I said it—and now we have another consent decree and now there is a question of whether there is good faith compliance with that, or whether the Executive has gone to the legislature to attempt to get the legislature to get them out of a commitment which they made voluntarily, in a consent decree.

I don't think, Ms. Nelson, you will find any case which says you are entitled to do that, and I can't do anything about it.

MS. MCGREW: Your Honor, we are prepared to show you at the hearing that the legislative proposal is

not inconsistent with your decree and that is what we are prepared to do.

THE COURT: That is different. I am certainly prepared to be shown that, in fact, there isn't anything contemptuous in this legislative proposal. That is another ballgame. I have no difficulty with that at all, but to tell me I don't have any jurisdiction to deal with that question, forget it.

I have no doubt at all that you cannot enter into a consent decree and then run to the Congress and try to get the consent decree vacated by an act of Congress. I don't think any decision that you can find will ever say that, and I don't [12] think any decision will ever come down which will say that because that is the kind of bad faith which not even the crown, much less the Executive Branch of the United States Government has the power to do.

All right, come back to the question which I asked earlier, which was what do you want as a return date on the rule to show cause?

I take it you need some time to prepare on each side.

* * * *

Supreme Court, U.S.
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(2)

No. 99-1163

In the Supreme Court of the United States

JAMES FERRELL, ET AL., PETITIONERS

v.

ANDREW CUOMO, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Department of Housing and Urban Development was required to continue to comply with a 1979 consent decree when continued compliance would have been contrary to the 1996 amendments to the National Housing Act.

2. Whether the court of appeals improperly ruled on the merits of the case when, in reviewing a preliminary injunction, the court determined that petitioners had no likelihood of success on the merits and remanded the case to the district court for further proceedings.

3. Whether the 1998 amendments to the National Housing Act require the Department of Housing and Urban Development to operate an equivalent substitute to the mortgage assignment program required by the 1979 consent decree.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 186 F.3d 805. The opinion of the district court (Pet. App. 19a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1999. A petition for rehearing was denied on October 13, 1999 (Pet. App. 34a-35a). The petition for a writ of certiorari was filed on January 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1973, petitioners—low and moderate income families who had purchased homes with mortgages insured under Sections 203 and 235 of the National Housing Act, 12 U.S.C. 1709, 1715z—filed a nationwide class action against the Secretary of Housing and Urban Development (HUD) in which they alleged that HUD had violated its duty to provide mortgage-foreclosure avoidance relief to homeowners with HUD-insured mortgages. Pet. App. 2a. The parties joined in a settlement agreement, which was entered as a consent decree with court approval on July 29, 1976. *Ibid.*; see *Ferrell* v. *Pierce*, 743 F.2d 454, 455-457 (7th Cir. 1984). Under the consent decree, HUD agreed to provide foreclosure avoidance relief through an assignment program. Pet. App. 2a. The program, which applied to single-family home mortgages fully insured by FHA, provided "foreclosure relief by allowing HUD to pay off the mortgage debt of a mortgagor in default, take assignment of the mortgage from the mortgagee, and then work out a payment plan for forbearance agreement with the mortgagor." *Ibid.*

In 1979, the parties agreed to an Amended Stipulation, which superseded the 1976 consent decree. Pet. App. 2a-3a. Under the Amended Stipulation, HUD agreed to operate the assignment program for five years, after which HUD would "provide assistance or relief in the form of the present assignment program or an equivalent substitute to permit mortgagors in default on their mortgages to avoid foreclosure and to retain their homes during periods of temporary financial distress." *Ferrell*, 743 F.2d at 458; Pet. App. 3a. The statutory authority for HUD's operation of a mortgage assignment program was, at that time, contained

in former Section 230 of the National Housing Act, 12 U.S.C. 1715u (1964 & Supp. IV 1968). Pet. App. 3a.

2. In 1996, Congress enacted The Balanced Budget Downpayment Act, I (Downpayment Act), Pub. L. No. 104-99, § 407(b), 110 Stat. 45, which amended Section 230. The amended Section, entitled "AUTHORITY TO ASSIST MORTGAGORS IN DEFAULT," no longer contains the provision that had authorized the mortgage assignment program. 110 Stat. 45. See 12 U.S.C. 1715u(e) (Supp. IV 1998).[1] Furthermore, amended Section 230 prohibits any "provision of this chapter, or any other law," from being construed "to require the Secretary to provide an alternative to foreclosure for mortgagees" or "to accept assignments of such mortgages." Downpayment Act, § 407(b), 12 U.S.C. 1715u(f) (Supp. IV 1998). In place of the eliminated assignment program, the Secretary is authorized to establish a program to pay partial claims to mortgagees for actions they have taken to cure mortgages in default, and to accept assignment of mortgages that mortgagees have modified to cure defaults, if repooling of the loans is not possible. 12 U.S.C. 1715u(b) and (c) (Supp. IV 1998).[2] In addition, the Act prohibits judicial review of any "decision by the Secretary to exercise or forego exercising any authority under [Section 230.]" 12 U.S.C. 1715u(d) (Supp. IV 1998).

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[1] In this brief, we cite the statutory provisions as renumbered by the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998 (1998 HUD Appropriations Act), Pub. L. No. 105-276, Tit. II, 112 Stat. 2469.

[2] Under a partial claims program, HUD pays a partial claim to a mortgagee that agrees to apply the payment to a mortgage in default, and the mortgagor then agrees to repay HUD for the partial claim.

On April 26, 1996, the effective date of the Downpayment Act, HUD stopped accepting new applications for mortgage assignment under the program described in the Amended Stipulation. Pet. App. 5a. HUD promulgated an interim regulation, effective August 2, 1996, which established a comprehensive approach to promote alternatives to foreclosure. *Ibid.* The new approach employs partial claims, as well as other techniques such as special forbearance plans, loan modifications, and deeds in lieu of foreclosure. See 61 Fed. Reg. 35,014 (1996) (codified at 24 C.F.R. Pts. 203, 206).

3. On September 27, 1996, HUD filed a motion to vacate its obligation under the Amended Stipulation to operate the mortgage assignment program or an equivalent substitute. Pet. App. 7a. On October 2, 1996, petitioners filed a motion to hold HUD in civil contempt for failing to comply with the Amended Stipulation. *Ibid.* Petitioners' motion included a request that the district court order HUD to reinstate the assignment program or an equivalent substitute pending the court's ruling on HUD's motion to vacate the Amended Stipulation. *Ibid.* The district court treated the request for reinstatement of the assignment program or an equivalent substitute as a motion for a preliminary injunction and agreed to rule on that motion while the other motions remained under consideration. *Ibid.*

The district court denied plaintiffs' motion to require HUD to reinstate the mortgage assignment program on the ground that plaintiffs had not shown irreparable injury. Pet. App. 7a. Subsequently, petitioners filed a renewed motion with evidence of harm allegedly constituting irreparable injury. *Id.* at 7a-8a.

4. On March 31, 1998, the district court issued a memorandum opinion and order granting a preliminary

injunction that required HUD to reinstate "either the assignment program or an 'equivalent' substitute, in the form of a mandatory partial claim program, until further order from [the] court." Pet. App. 8a. The district court acknowledged that Section 407(a) of the Downpayment Act amends the National Housing Act to eliminate the statutory authority for HUD to operate the assignment program, but the court held that 42 U.S.C. 1441 and 42 U.S.C. 3535 together authorize HUD's continued operation of the program. Pet. App. 8a. Section 1441 declares that the goal of national housing policy shall be "a decent home and a suitable living environment for every American family" and directs HUD to exercise its powers, duties, and functions consistently with that policy. Section 3535 authorizes the Secretary to "make such rules and regulations as may be necessary to carry out his functions, powers, and duties," to sell or exchange securities or obligations, and to consent to the modification of any term of any contract or agreement to which he is a party or which has been transferred to him. See 42 U.S.C. 3535(d), (i)(3) and (5).

Further, the district court held that the Downpayment Act did not alter HUD's obligation to seek modification of the Amended Stipulation from the court before terminating the assignment program. Pet. App. 9a. Finding that petitioners were likely to succeed on their motion to hold HUD in contempt, that they had shown irreparable harm, and that "no adequate remedy at law exists for the loss of one's home due to the denial of foreclosure assistance," the court issued the preliminary injunction described above. *Id.* at 9a-10a. HUD appealed.

5. The court of appeals reversed. Pet. App. 1a-18a. Initially, the court noted that, in assessing the probabil-

ity of success on the merits, the district court should have focused on whether HUD was required to continue to operate the mortgage assignment program or an equivalent substitute after enactment of the Downpayment Act, rather then on whether HUD was in civil contempt for terminating compliance with the Amended Stipulation before receiving the district court's consent. *Id.* at 11a-12a. The court explained that, "[e]ven if HUD might be found in contempt for its delay in seeking modification of the Amended Stipulation, this shortcoming would not justify a preliminary injunction unless it is also true that [petitioners] have some likelihood of prevailing on the ultimate issue of HUD's obligation to continue the assignment program." *Id.* at 12a.

The court of appeals concluded that "[v]arious provisions of the Downpayment Act manifest Congress' intent to terminate the mortgage assignment program required by the Amended Stipulation." Pet. App. 12a. As the court explained, amended Section 230 (1) provides that no law shall be construed to require the Secretary to provide an alternative to foreclosure or to accept mortgage assignments, 12 U.S.C. 1715u(f) (Supp. IV 1998); (2) precludes judicial review of any decision by the Secretary to exercise or forgo exercising any authority under that Section, 12 U.S.C. 1715u(d) (Supp. IV 1998); and (3) requires mortgagees to take certain foreclosure avoidance and loss mitigation actions but expressly excludes from those required actions the assignment of mortgages to the Secretary, 12 U.S.C. 1715u(a) (Supp. IV 1998). Pet. App. 13a. The court also noted that Section 407(a) of the Downpayment Act amended Section 204(a) of the National Housing Act (12 U.S.C. 1710(a) (Supp. IV 1998)) to authorize HUD to pay insurance benefits to mortgagees who take

foreclosure avoidance actions but excluded from such recompensable actions the assignment of mortgages to the Secretary. Pet. App. 13a.

The court of appeals next rejected the district court's conclusion that other statutory provisions authorize continued operation of the mortgage assignment program. Pet. App. 14a. The court concluded that the general authority conferred by 42 U.S.C. 1441 and 3535, which direct HUD to exercise its powers consistently with national housing policy and authorize HUD to make rules and regulations necessary to carry out its duties, see p. 5, *supra*, is insufficient to overcome the more specific directions of the Downpayment Act. Pet. App. 14a.

The court also rejected the district court's conclusion that HUD retained authority to operate an "equivalent substitute" for the mortgage assignment program in the form of a mandatory partial claims program under Section 407(b) of the Downpayment Act, 12 U.S.C. 1715u(b) (Supp. IV 1998). The court explained that the Act does not require the Secretary to establish a partial claims program and does not authorize the Secretary to require mortgagees to participate in such a program. Pet. App. 14a-15a. Thus, "the authority, and the obligations, of the Secretary under the newly enacted provisions are not the same as those under the earlier statutory scheme that the Amended Stipulation was intended to enforce." *Id.* at 15a.

The court of appeals noted that the 1998 HUD Appropriations Act, Pub. L. No. 105-276, Tit. II, 112 Stat. 2469, enacted while the appeal in this case was pending, confirms that Congress intended to terminate the Amended Stipulation's assignment program. Pet. App. 6a n.3, 15a n.7. Congress "made specific reference to the Downpayment Act's withdrawal of authority for the

mortgage assignment program and made clear its intent that HUD no longer operate the assignment program previously required by the Amended Stipulation." *Id.* at 15a-16a n.7 (citing 12 U.S.C. 1710(a)(9) (Supp. IV 1998)).[3] In addition, the court explained, "the Appropriations Act's amendments to Section 204(a)(2) of the National Housing Act (12 U.S.C. 1710(a)(2) (Supp. IV 1998)) contradict [petitioners'] argument that HUD retains authority to operate an 'equivalent substitute' for the assignment program in the form of a mandatory partial claim program." Pet. App. 16a n.7. Section 1710(a)(2) indicates that the mortgagee bears responsibility for loss mitigation actions and allows the Secretary to compensate the mortgagee for such actions with insurance benefits. Further, it expressly provides that "no action or failure to act by either the Secretary or a

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[3] Section 1710(a)(9) provides:

Treatment of mortgage assignment program

Notwithstanding any other provision of law, or the Amended Stipulation entered as a consent decree on November 8, 1979, in Ferrell v. Cuomo, No. 73 C 334 (N.D. Ill.), or any other order intended to require the Secretary to operate the program of mortgage assignment and forbearance that was operated by the Secretary pursuant to the Amended Stipulation and under the authority of section 1715u of this title, prior to its amendment by section 407(b) of The Balanced Budget Downpayment Act, I (Public Law 104-99; 110 Stat. 45), no mortgage assigned under this section may be included in any mortgage foreclosure avoidance program that is the same or substantially equivalent to such a program of mortgage assignment and forbearance.

mortgagee under that paragraph shall be subject to judicial review." *Id.* at 16a n.7[4]

After concluding that Congress had deprived HUD of authority to operate the mortgage assignment program or an equivalent substitute, the court of appeals explained that a change in the law can require modification of a consent decree. Pet. App. 15a- 16a (citing cases). Applying that principle to this case, the court held that "there is no likelihood of [petitioners'] prevailing on the merits of their motion to require HUD to reinstate the assignment program." *Id.* at 16a-17a.

The court expressed concern that HUD delayed "almost eight months after Congress passed the Downpayment Act before petitioning the district court for modification of the Amended Stipulation," Pet. App. 17a, but the court concluded that the delay "cannot justify a preliminary injunction requiring HUD to do something that it no longer has the statutory authority to do." *Ibid.* The court also concluded that a civil contempt citation against HUD is not warranted. *Ibid.* Because the underlying order embodied in the Amended Stipulation is no longer valid, a civil contempt citation would not serve either of the purposes of civil

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[4] Section 1710(a)(2) provides:

Payment for loss mitigation

> The Secretary may pay insurance benefits to the mortgagee to recompense the mortgagee for all or part of any costs of the mortgagee for taking loss mitigation actions that provide an alternative to foreclosure of a mortgage that is in default (including but not limited to actions such as special forbearance, loan modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under paragraph (1)(A)). No actions taken under this paragraph, nor any failure to act under this paragraph, by the Secretary or by a mortgagee shall be subject to judicial review.

contempt—to coerce compliance with an underlying order or to compensate the complainant for loss sustained by disobedience. *Ibid.*

In light of its ruling that petitioners had no likelihood of success on the merits, the court declined to review the district court's findings regarding irreparable harm or the absence of an adequate remedy at law. Pet. App. 17a. The court reversed the grant of the preliminary injunction and remanded the case to the district court for further proceedings. *Id.* at 17a, 18a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioners first argue (Pet. 9-15) that HUD must continue to operate the mortgage assignment program or an equivalent substitute until the district court vacates or modifies the Amended Stipulation. That argument is unavailing, however, because the court of appeals correctly determined that Congress withdrew HUD's statutory authority to operate the program or an equivalent substitute when it enacted the Downpayment Act. Pet. App. 12a-15a. Petitioners do not challenge that interpretation of the Downpayment Act in this Court. See Pet. 21 & n.6.[5]

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[5] Petitioners do contend (Pet. 21-25) that the 1998 HUD Appropriations Act authorizes HUD to run "an equivalent (loss mitigation-based) foreclosure-avoidance program under the amended Section 230(a), 12 U.S.C. § 1715u(a)." Pet. 21. As we explain at pages 14-15, *infra*, however, the court of appeals correctly held that the 1998 HUD Appropriations Act actually confirms Congress's intent to terminate the programs required by the Amended Stipulation.

The Amended Stipulation was premised on HUD's purported obligation under the National Housing Act to provide foreclosure avoidance relief through the operation of a mortgage assignment program. Pet. App. 2a. When Congress enacted the Downpayment Act and removed HUD's authority to operate such a program or its equivalent, modification of the Amended Stipulation was required. *System Fed'n No. 91* v. *Wright*, 364 U.S. 642 (1961). There was therefore no basis for a preliminary injunction mandating continued operation of the program.

Moreover, the court of appeals correctly determined that HUD's delay in notifying the district court that it had discontinued accepting applications under the program did not warrant the imposition of a civil contempt sanction. Pet. App. 17a. That is particularly true because the sanction that petitioners sought, and the district court entered, was a preliminary injunction requiring operation of the program. The purposes of a civil contempt sanction are to coerce compliance with the underlying order or to compensate the complainant for loss sustained by disobedience of the order. See, *e.g.*, *Blocksom & Co.* v. *Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978). Neither of those purposes is served by the district court's issuance of a preliminary injunction requiring continued operation of a program that federal law no longer authorizes.

The cases relied upon by petitioners (Pet. 10-12) for the general principle that parties must comply with court orders until those orders are vacated do not conflict with the decision of the court of appeals. None of those cases involved a situation in which Congress changed the law so that an injunctive order requiring continued compliance with a consent decree would have conflicted with congressional intent.

Petitioners place primary reliance on *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), in which this Court held that civil contempt for violation of an injunctive order need not be premised on a finding that the violation was willful. *Id.* at 191. The portions of the opinion cited by petitioners (Pet. 10-11) explain that a claim that the scope of an injunctive order is unclear is not a defense to a contempt sanction for violation of the order. Nothing in *McComb* suggests that a civil contempt sanction is appropriate to enforce an injunction that requires actions that contravene federal law.

The other three decisions of this Court on which petitioners rely are equally unhelpful to them. In *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), the Court held that intervening precedent required modification of a school desegregation decree; the Court did not pass on the propriety of a civil contempt order. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), involved criminal, rather than civil, contempt. *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), involved an adjudication of both criminal and civil contempt. This Court held that violations of a court order are punishable by criminal contempt even if the underlying order is set aside on appeal; in contrast, a civil contempt sanction falls if the underlying order is proved on appeal to have been issued erroneously. *Id.* at 294-295. Thus, to the extent *United Mine Workers* is applicable, it supports our position that civil contempt cannot be sustained when the underlying order must be modified because of intervening congressional action.

Petitioners' reliance on two Seventh Circuit decisions as a basis for review by this Court is also unavailing. Any intra-circuit conflict would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, the Seventh Circuit did not

uphold a finding of contempt in either *Kindred* v. *Duckworth*, 9 F.3d 638 (7th Cir. 1993), or *Komyatti* v. *Bayh*, 96 F.3d 955 (7th Cir. 1996). Rather, in both cases, the court remanded for consideration of whether modification of the underlying decree was necessary because of intervening legislation. See *Kindred*, 9 F.3d at 644; *Komyatti*, 96 F.3d at 962 & n.8, 964.

2. Petitioners' argument (Pet. 15-20) that the court of appeals improperly foreclosed the district court's ultimate determination of the merits of this case is also incorrect. The court of appeals did not render a final judgment on the merits of the case. An appellate court reviewing a preliminary injunction must assess the plaintiff's likelihood of success on the merits. See, *e.g.*, *Brown* v. *Chote*, 411 U.S. 452, 456 (1973); *University of Tex.* v. *Camenisch*, 451 U.S. 390, 394 (1981). That is precisely what the court of appeals did here. Applying that standard, the court concluded that "there is no likelihood of [petitioners'] prevailing on the merits of their motion to require HUD to reinstate the assignment program." Pet. App. 16a-17a. Having made that determination, the court of appeals properly "reverse[d] the judgment of the district court and remand[ed] for further proceedings." *Id.* at 18a.

Contrary to petitioners' contention (Pet. 16-18), that action does not conflict with *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). In *Rufo*, the Court set out the standard that courts should use to evaluate requests to modify consent decrees. Nothing in *Rufo* prohibits a court of appeals, when reviewing the propriety of a preliminary injunction, from evaluating the likelihood that the party seeking the injunction will succeed on the merits of the underlying case.

3. Petitioners are also wide of the mark in contending (Pet. 21-25) that the 1998 HUD Appropriations Act

authorizes HUD "to run an equivalent (loss mitigation-based) foreclosure-avoidance program under the amended Section 230(a), 12 U.S.C. § 1715u(a)." Pet. 21. The court of appeals correctly determined that the Appropriations Act instead confirms that Congress withdrew HUD's authority to operate the mortgage assignment program or an equivalent substitute. Pet. App. 15a-16a n.7.

Petitioners do not challenge the court's conclusion that, under current law, HUD lacks authority to operate either the assignment program or a mandatory partial claims program. Pet. 21 & n.6. Petitioners instead complain (Pet. 22-23) that the court of appeals, in considering possible substitutes for the assignment program, focused only on a partial claims program. But the court of appeals focused on that particular substitute because petitioners focused on it in the brief they submitted to the court following enactment of the Appropriations Act.

In any event, just as the Appropriations Act confirms that HUD lacks authority to operate a mandatory partial claims program, see pp. 8-9 & n.4, *supra*, it also confirms that HUD may not operate the mandatory "special forbearance" and "[loan] modification" programs that petitioners now advocate (Pet. 23). Consistent with 12 U.S.C. 1710(a)(2) (Supp. IV 1998), on which the court of appeals relied in discussing the partial claims program, 12 U.S.C. 1715u(a) (Supp. IV 1998), on which petitioners rely, places the obligation to engage in loss mitigation efforts on the mortgagee, rather than HUD.[6] The failure of a mortgagee to engage in ap-

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[6] Section 1715u(a) provides: "Upon default of any mortgage insured under this subchapter, mortgagees shall engage in loss mitigation actions for the purposes of providing an alternative to

propriate loss mitigation efforts results in a severe penalty. See 12 U.S.C. 1735f-14(b)(1)(I), 1735f-14(a)(2) (Supp. IV 1998).[7] See also 24 C.F.R. 203.51 (describing loss mitigation techniques that mortgagees must consider).

Moreover, as the court noted with respect to the partial claims program, see pp. 8-9, *supra*, the Secretary's action or inaction with regard to other loss mitigation efforts, including "special forbearance" and "[loan] modification," is not subject to judicial review. 12 U.S.C. 1715u(a), 1715u(d) (Supp. IV 1998). Thus, the 1998 amendments provide no support for a judicial decree requiring the Secretary to operate a loss mitigation program. Rather, they reinforce the conclusion that the injunction that petitioners sought, and the district court imposed, is contrary to congressional intent.

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foreclosure (including but not limited to actions such as special forbearance, loss modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under [12 U.S.C. 1710(a)(1)(A)]) as provided in regulations by the Secretary."

[7] Section 1735f-14(b)(1)(I) authorizes the Secretary to impose civil money penalties for a mortgagee's knowing and material "[f]ailure to engage in loss mitigation actions as provided in section 1715u(a)." Section 1735f-14(a)(2) provides that, "[i]n the case of the mortgagee's failure to engage in loss mitigation activities, as provided in [Section 1735f-14(b)(1)(I)], the penalty shall be in the amount of three times the amount of any insurance benefits claimed by the mortgagees with respect to any mortgage for which the mortgagee failed to engage in such loss mitigation actions."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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